

ORIGINAL

No. 12648

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United States  
Court of Appeals  
for the Ninth Circuit.

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PERRY E. BURNHAM and L. EARL  
BURNHAM,

Appellants,

vs.

J. HAROLD ABEGGLEN,

Appellee.

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Transcript of Record

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Appeal from the District Court of the United States  
for the District of Idaho,  
Southern Division.

FILED  
OCT 31 1930

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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BRANCH BIRD, ESQ.,  
Gooding, Idaho,  
For the Plaintiff.

J. D. SKEEN, ESQ.,  
Salt Lake City, Utah,

OSCAR W. WORTHWINE, ESQ.,  
Boise, Idaho,  
For the Defendants.

In the District Court of the United States in and  
for the District of Idaho  
(Southern Division)

No. 2674

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and L. EARL  
BURNHAM,

Defendants.

### PETITION FOR REMOVAL

Come now the defendants above named, petitioners, and make and file this Petition for Removal of the above-entitled action from the District Court of the Fourth Judicial District in and for Blaine County, State of Idaho, in which it is now pending, to the District Court of the United States for the District of Idaho, Southern Division, and petitioners respectfully show to the Court:

1. That the above-named plaintiff instituted the above-entitled proceeding in the District Court of the Fourth Judicial District for Blaine County, Idaho, by filing a Complaint therein on the 13th day of June, 1949, and service of Summons in said cause was made upon the defendants herein on the 22nd day of June, 1949, at Hailey, Idaho. That the time for your petitioners to appear, answer or otherwise plead to the said Complaint has not expired and will not expire until the 12th day of July, 1949.

2. That the above-entitled action is an action of civil nature at common law, and the amount in controversy therein, exclusive of interest and costs, is in excess of \$3,000.00 and is the sum of \$6,000.00. The cause of action set forth and relied upon by the plaintiff is for the amount stated and is based upon an alleged contract for the payment of a real estate dealer's commission.

3. The plaintiff in said cause is now and was, at the time of the commencement of said action, and for a long time prior thereto, a resident of the State of Idaho; that the defendants in said cause, and the petitioners herein, are now, and at all times mentioned, have been and were, at the time of the commencement of said action, residents and citizens of the State of Utah. That Perry E. Burnham is a resident and citizen of Salt Lake City, State of Utah, and the said L. Earl Burnham is a resident and citizen of Bountiful, State of Utah.

4. That the controversies in this action and every issue of law and fact therein are wholly between citizens of different states and can be fully determined as between them.

5. Your petitioners file herewith a good and sufficient surety bond pursuant to the statutes in such cases made and provided with good and sufficient surety conditioned that the defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed. Your petitioners attach hereto a true



copy of the Summons and all pleadings and Orders served upon them or either of them in said action in the said District Court for Blaine County.

By reason of the premises, your petitioners are entitled to have this suit removed to the said District Court of the United States for the District of Idaho, Southern Division.

Wherefore, your petitioners pray that the said cause shall be deemed to be removed as of the date of the filing of this Petition and that the said District Court for Blaine County, Idaho, proceed no further therein.

/s/ J. D. SKEEN,

Attorney for Petitioners.

State of Utah,

County of Salt Lake—ss.

Perry E. Burnham and L. Earl Burnham, being first duly sworn, depose and say: That they are the petitioners above named; that they have read the foregoing Petition for Removal, know the contents thereof and that the same is true to the best of their knowledge, information and belief.

/s/ PERRY E. BURNHAM,

/s/ L. EARL BURNHAM.

Subscribed and Sworn to before me this 7th day of July, 1949.

[Seal]:       /s/ EMILY URRY,  
Notary Public.

[Endorsed]: Filed July 9, 1949.



[Title of District Court and Cause.]

NOTICE OF REMOVAL

To the Above-Named Plaintiff and to Everett B.  
Taylor and Bissell & Bird, His Attorneys:

You and each of you will take notice that the defendants above named have filed their verified Petition in the United States District Court for the District of Idaho, Southern Division, containing a statement of the facts which entitle them to removal of the above-entitled cause from the District Court for Blaine County, State of Idaho, to the said United States District Court for the District of Idaho, together with a copy of all process, pleadings and orders served upon them, together with a good and sufficient bond in the penal sum of \$500.00 and sufficient surety conditioned that the defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed and by the filing of said petition and a copy of the said process, pleadings and orders served upon them and the said bond, said cause has been removed from the said District Court of Blaine County, Idaho, to the District Court of the United States for the District of Idaho, Southern Division, and the State Court shall proceed no further therein.

/s/ J. D. SKEEN,

Attorney for Defendants.

Affidavit of Mailing Attached.

[Endorsed]: Filed July 9, 1949.

[Title of District Court and Cause.]

### AMENDED COMPLAINT

For his cause of action against said defendants, and as his amended complaint filed with consent of the defendants, the plaintiff alleges:

1.

That at all times herein mentioned plaintiff has been and now is a real estate broker duly licensed under the laws of Idaho, with his principal place of business at Hailey, Idaho.

2.

That on April 29th, 1948, plaintiff was employed by the defendants to procure a purchaser for certain real estate and personal property situate in said Blaine County; that said contract of employment was in writing, and as follows:

“J. Harold Abegglen,  
Bonded Real Estate Broker,  
Hailey & Blaine County, Idaho  
Phone 193-W

In consideration of your agreement to list the property and to use your efforts to find a purchaser, I hereby appoint and constitute you my agent with right to sell the following described property for a period of Sixty days from date hereof, and thereafter until you receive from me a written notice terminating this agency and agreement.

Location: Gannett, Idaho.

Description: Cove Ranch, known to contain 3,313 acres, more or less. 1500 acres under cultivation, 1,800 acres in pasture and range, 1 five-room house and 1 four-room house with spring culinary water and all out buildings. Machinery and livestock can be purchased extra.

Said property to be sold for \$140,000.00 on the following terms: Cash \$25,000.00. Balance \$ at 4% on terms drawn up in contract or upon any other price, terms or exchange to which I may consent.

If said property is sold before the expiration of this agreement, or if it is sold after such expiration to any person with whom you have had negotiations hereunder, I agree to pay you 5% commission on said sale price, less \$1,000.00 and to furnish abstract showing good merchantable title to the purchaser. In the event of sale I will deliver warranty deed properly executed conveying the property to purchaser.

I reserve the right to sell this property direct without the aid of my agent, and in such event no commission is to be charged and I agree to give my agent immediate notice of such sale. I agree not to offer this property for sale at a less price than that hereon stated, unless such price shall first have been given to my said agent.

In case a deposit is forfeited, one-half of same shall go to said agent as commission and one-half to me, provided, however, that the agent's share

shall not exceed the amount of the above-named commission.

Dated and accepted: April 29, 1948.

/s/ PERRY E. BURNHAM,  
Seller.

/s/ L. EARL BURNHAM,  
Address.

May 15, 1948.

It is further agreed that the commission as stated on the reverse side of this paper be paid as follows:

\$2,000.00 when the first \$25,000.00 is paid and \$2,000.00 when the second \$25,000.00 is paid and the remaining \$2,000.00 when the full down payment of \$70,000.00 is paid on the purchase price of this Cove Ranch, making a total of \$6,000.00 commission.

Approved by:

/s/ PERRY E. BURNHAM.

/s/ L. EARL BURNHAM.

J. D. SKEEN,"

Witness.

3.

That thereafter and within the time mentioned in the above contract the plaintiff procured purchasers who were able, ready and willing to purchase said listed property, and thereupon the defendants entered into an agreement with said purchasers, which was satisfactory and agreeable to the defendants, a

true copy of which agreement is attached hereto, marked Exhibit A, and by this reference made a part hereof as fully as if copied herein verbatim.

4.

That thereafter and under date of August 12, 1948, the defendant and the purchasers of said property entered into a written agreement modifying certain of the terms and conditions of the agreement so entered into May 11, 1948 (Ex. A), the latter agreement being as follows:

“AGREEMENT

This Agreement made by and between Perry E. Burnham and L. Earl Burnham, as Parties of the First Part, and Carl H. Randell, Edward Randall and Oriel Randall, as parties of the Second part.

Witnesseth:

Whereas, the Parties of the First Part made and entered into an agreement with the Parties of the Second Part on the 11th day of May, 1948, whereby Parties of the First Part contracted to sell to the Parties of the Second Part real and personal property therein described and as security for the performance of said real and personal property to the Parties of the Second Part, the Parties of the Second Part individually undertook and agreed to execute and to deliver to the Parties of the First Part three negotiable promissory notes each for the sum of \$25,000.00 and each secured by a Mortgage upon



real estate located in Jerome County and Payette County, and

Whereas, Carl Randall, one of the Parties of the Second Part, failed and neglected to execute and deliver a mortgage covering real property alleged to have been owned by him and is not now able to give to the Parties of the First Part security for the payment of the note for \$25,000.00, and

Whereas, Edward Randall and Oriel Randall, Parties of the Second Part, and buyers, under the contract hereinabove referred to, have executed and delivered to the Parties of the First Part herein mortgages in accordance with the said Agreement, and

Whereas, it is the desires of the Parties hereto that said contract should be consummated and modified as herein provided,

Now, Therefore, it is mutually agreed as follows:

That the Parties of the Second Part hereby agree to, and by these presents do return to the Parties of the First Part, herein, and the sellers under the original contract referred to, the following described personal property, to wit:

- 16 Holstein Steers—Yearlings
- 12 Holstein Heifers—Yearlings
- 2 Guernsey cows, 3 & 4 years old
- 2 Jersey cows, 2 Years old
- 34 Holstein cows, 2 to 4 Years old
- 1 Purebred Holstein bull, 4 Years old
- 18 Holstein calves, 1 wk. to 4 Mos. old
- 14 Holstein Springer cows and heifers.

Provided that the said cattle shall remain upon the range near the Cove Ranch until the harvesting of hay and grain has progressed to a point that they can be put in the fields, at which time, they shall be removed from the range to the field and shall, at all times, be cared and provided for by the Parties of the Second Part. At such time as the Parties of the First Part deem it advisable to market the said cattle, they will sell them at the highest market price obtainable and out of the proceeds of the sale, they shall pay the actual and necessary costs of caring for and marketing cattle and credit the balance on the contract dated May 11, 1948.

It Is Further Agreed that the credit from the sale of said property as herein provided shall stand in lieu of the mortgage security which the said Carl Randall agreed to give under the terms of the original contract; that the mortgages given by Oriel Randall and Edward Randall and filed for record and recorded in the counties where the land is located shall be held and applied as provided in the contract dated May 11, 1948, and further, that one-third of the grain crop upon land now under lease to Nek Stelma and E. D. Kimbrough shall likewise be applied upon the purchase price of the property described in the said contract of May 11, 1948, less the property returned to the sellers as herein provided, and said contract as herein modified shall be deemed to be in full force and effect.

In Witness Whereof, the Parties hereto have

hereunto set their hands this Twelfth (12) day of August, 1948.

Signed in the presence of:

/s/ PERRY E. BURNHAM,

/s/ L. EARL BURNHAM,

Parties of the First Part.

/s/ CARL H. RANDALL,

/s/ EDWARD RANDALL,

/s/ ORIEL RANDALL,

Parties of the Second Part.

.....,

Witness.

5.

That upon the execution and delivery of the contract mentioned in paragraph three, copy of which appears as Exhibit A to this amended complaint, and in the latter part of May, 1948, said purchasers Carl H., Oriel and Edward Randell, and each of them, entered into possession of the said Cove Ranch, so described in Exhibit A hereto, together with the personal property therein described, and continued in possession of said real and personal property during the season of 1948, farmed said real property and cared for said personal property, and among other things said purchasers plowed two hundred (200) acres of land, milked, fed and cared for the dairy stock, and marketed the produce thereof, added two rooms to one of the dwelling houses on said ranch, cleaned, papered and painted



portions of the two dwelling houses and made various improvements thereto, paid all taxes in due season, the amount for the period being approximately \$800.00, paid water assessments, and generally operated said real estate and personal property in accord with the terms and conditions of the existing contract between the defendants and said purchasers.

## 6.

That payments were made from said purchasers to the defendants herein upon the purchase price of said land and personal property in approximately the following amounts and particulars: (1) on account of cattle and horses sold, with the proceeds thereof applied on said purchase price \$9,098.16; (2) on account of grain marketed, after expense was paid, with net amount applied upon the purchase price of said Cove Ranch and said livestock—\$11,753.83; (3) two truck loads of cattle sold about December 18, 1948, with the proceeds credited on the purchase price of said Cove Ranch and livestock approximately \$3,000.00; (4) on account of payments made on the Kraft Cheese Company account through the sale of dairy products, as authorized by said contract of purchase (Ex. A hereto) \$2,-131.94; that in addition to said credits upon said purchase price there is a balance which said purchasers have agreed to pay the defendants herein under the terms of the settlement agreement included hereinafter in the sum of \$6,000.00, which will also constitute a payment upon the purchase price of said Cove Ranch and livestock, making the total sums of

money and credits paid and to be paid by said purchasers to the defendants upon said purchase price of the Cove Ranch and livestock the total sum of \$31,983.93; that said total sum has been forfeited and paid or will be paid by said purchasers on account of the purchase price of said Cove Ranch and livestock.

## 7.

That thereafter and at the special instance and request of the defendants herein, and without the knowledge, consent or approval of the plaintiff, the defendant entered into an agreement with said purchasers whereby it was voluntarily and mutually agreed between the defendants and said purchasers that said contract (Ex. A) should be terminated and possession thereof restored to the defendants; that such settlement agreement was in writing and is in full as follows:

“Agreement

“This agreement made by and between Perry E. Burnham and L. Earl Burnham, parties of the first part and Carl Randell, Edward Randell and Oriel Randell, parties of the second part, witnesseth:

In consideration of the execution and delivery to the parties of the first part of a quit claim deed of the real estate located in Blaine County, Idaho, and known as the Cove Ranch, the parties of the first part agree to and do hereby sell and transfer to the parties of the second part all cattle now in their possession which cattle have heretofore been upon upon the Cove Ranch and said parties of the first

part further agree upon payment to them within one year of this date of the sum of \$6,000.00 with interest at the rate of 6% per annum to satisfy and discharge of record a real estate mortgage of Oriel Randell to the parties of the first part dated May 24, 1948, covering lands located in Jerome County, State of Idaho, given to secure payment of a note for \$25,000.00 which mortgage was recorded on May 26, 1948, in book 137 of Mortgages, page 525; and parties of the first part further agree to satisfy and discharge of record a mortgage from Edward Randell and Esther Randell to the parties of the first part covering lands in Payette County, Idaho, to secure payment of a note for \$25,000.00 dated June 8, 1948, and recorded in book 20 of Mortgages, page 543; and the parties of the first part further agree to cancel and deliver to Carl H. Randell a promissory note dated May 11, 1948, for \$25,000.00 payable to the parties of the first part upon and to satisfy and cancel a note for \$25,000.00 dated June 8, 1948, from Edward Randell and wife to the parties of the first part and also to cancel and return to Oriel Randell a promissory note dated May 11, 1948, payable to the parties of the first part for \$25,000.00.

Upon payment of the said sum of \$6,000.00 with interest as herein provided, all obligations growing out of the contract dated May 11, 1948, for the sale by the parties of the first part to the parties of the second part of the Cove Ranch located in Blaine County, Idaho, shall be settled, satisfied and adjusted and all obligations growing out of or con-

nected with the said contract will thereupon be satisfied and discharged.

If the payment of the said \$6,000.00 and interest as herein provided is not made within one year, the said mortgages and notes herein described shall be in full force and effect and subject to suit, judgment and foreclosure.

Dated this 4th day of April, 1948 (1949).

/s/ ORIEL RANDELL,

/s/ EDWARD RANDELL,

/s/ ESTHER RANDELL,

/s/ CARL H. RANDELL,

/s/ LOENA M. RANDELL,

/s/ PERRY E. BURNHAM,

/s/ L. EARL BURNHAM.”

8.

That thereafter the defendants sold said Cove Ranch to some third person, thereby putting it beyond the power of the defendants to comply with the sale contract between the defendants and the purchasers so procured by plaintiff.

9.

That no part of plaintiff's said commission of \$6,000.00 has been paid, though demand has been made upon the defendants and each of them for the payment thereof.

Wherefore Plaintiff prays that he have and re-

cover judgment against the defendants, namely, Perry E. Burnham and L. Earl Burnham, and each of them, in the sum of \$6,000.00, with interest thereon at the rate of 6% per annum from April 4, 1949, for costs of suit and all proper relief.

/s/ E. B. TAYLOR,

/s/ W. G. BISSELL,

/s/ BRANCH BIRD,

Attorneys for Plaintiff.

State of Idaho,  
County of Gooding—ss.

Branch Bird, being first duly sworn upon his oath deposes and says: That he is one of the attorneys for the plaintiff in this action, and makes this verification for and on behalf of the plaintiff for the reason that plaintiff is absent from the county where deponent resides and has his office; that he has read said amended complaint and knows the contents thereof and believes the statements therein contained to be true.

/s/ BRANCH BIRD.

Subscribed and sworn to before me this 20th day of August, 1949.

[Seal]      /s/ RUTH BLISS WISWELL,  
Notary Public,  
Gooding, Idaho.



## Exhibit A

## Agreement

This Agreement made in duplicate this 11th day of May, 1948, By and between Perry E. Burnham and L. Earl Burnham, of Salt Lake City, Utah, herein referred to as Sellers and Carl H. Randell, Edward Randell and Oriel Randell of Idaho, herein referred to as Buyers.

## Witnesseth

For the consideration hereinafter stated, the Sellers agree to sell to the Buyers, and the buyers agree to purchase the following described Real Personal and Mixed property located in Blaine County, State of Idaho to Wit:

Tp 1 N, R 19 E, Boise Meridian;

Sec. 17: All of Sec. 17 including tax lots 143 and 1032, 1030, 1031, 1028, 1029 and 145, excepting therefrom the right of way of the Ketchum branch of the O.S.L. Rd., through Sec. 17 and the  $N\frac{1}{2}NE\frac{1}{4}$  and  $SE\frac{1}{4}NE\frac{1}{4}$ , and  $N\frac{1}{2}NW\frac{1}{4}$ .

Sec. 21: All of the  $SW\frac{1}{4}$  and the  $W\frac{1}{2}NW\frac{1}{4}$ , including Lot 8, 9, 10, 11 and 12.

Sec. 28: All of the  $E\frac{1}{2}$  including tax lots 163 and 1039, and all of that part of the  $W\frac{1}{2}$  lying to the East of the right of way of the Ketchum Branch of the O.S.L. Rd., including tax lots 155, 159, and 160.

Sec. 29: All that part of the  $NE\frac{1}{4}$  lying to the East of the right of way of the Ketchum branch of the O.S.L. Rd.

Sec. 33: All of the NE $\frac{1}{4}$  including tax lots 164, 165 and 166, but excluding therefrom the right of way of the Ketchum branch of the O.S.L. Rd.

Sec. 27: The SW $\frac{1}{4}$ , the S $\frac{1}{2}$ NW $\frac{1}{4}$ , the NE $\frac{1}{4}$  and the N $\frac{1}{2}$  SE $\frac{1}{4}$ .

Sec. 26: The N $\frac{1}{2}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , the NW $\frac{1}{4}$ -NW $\frac{1}{4}$ , the SW $\frac{1}{4}$ NE $\frac{1}{4}$  and the NW $\frac{1}{4}$ SE $\frac{1}{4}$ .

Sec. 22: All of the E $\frac{1}{2}$ .

Sec. 15: The SE $\frac{1}{4}$  and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ .

Sec. 14: The SW $\frac{1}{4}$ , the S $\frac{1}{2}$ SE $\frac{1}{4}$ , the NE $\frac{1}{4}$ -SE $\frac{1}{4}$ , and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ .

Sec. 23: The N $\frac{1}{2}$ NW $\frac{1}{4}$ , and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ .

Tp 1 N, R 20 E, Boise Meridian:

Sec. 19: Lot No. 1 in Sec. 19.

Tp 1 N, R 19 E, Boise Meridian:

Sec. 20: All of Sec. 20 lying East of the right of way of the Ketchum branch of the O.S.L. Rd., including tax lots 147, 150, 151, and 154, also NW $\frac{1}{4}$ -NW $\frac{1}{4}$  and tax lots 146 and 147 S. and E. of the O.S.L. Rd. line. Also all personal property described in inventory attached hereto.

Together with all Water Rights heretofore used upon or in connection with said land and including all improvements and appurtenances; also including 350 Taylor Grazing permits, and all personal property described in the Exhibit A attached to and made a part of this Contract. Which property has heretofore been known as the Cove Ranch.

The Sellers further agree to seek to recover ten (10) Shares of Sawtooth Grazing Association Stock and other permits claimed to belong to said property, and if said recovery is made in whole or in part, to transfer the same to the Buyers for the actual cost of the recovery of said property. All of said property is to be transferred subject to Share Crop Leases of wheat land, and the Sellers agree to provide houses for the said Share Croppers pursuant to the terms of a written Lease heretofore made.

The Buyers agree to pay for said property the sum of \$140,000.00 as follows: \$70,000.00 on or before two (2) years from date hereof, and \$70,000.00 in six (6) equal annual installments beginning May 15, 1949. All deferred payments shall bear interest at the rate of 4% per annum, payable annually.

The Buyers are to secure payment of the \$70,000.00, payable on or before two (2) years from date hereof with three (3) separate promissory notes for \$25,000.00; each made, executed, and delivered by the said Buyers and their Wives, and secured by Real Estate Mortgages upon the Real Estate described in Exhibit B, C, and D, attached to this Contract and made a part hereof. Said mortgages to be in usual form, and the status of the Title to the said Real Estate is to be disclosed by a report of abstractor for the Counties in which the said land is located, showing conveyances affecting the Title to said land since Deeds were received by the respective owners. The said notes and



mortgages to be executed and delivered to the Sellers prior to the talking of possession of said property by the Buyers.

Upon payment of the sum of \$25,000.00 on account of the purchase price of the said property, the Sellers agree to release either one of the three (3) mortgages designated by the Buyers and when the full sum of \$70,000.00 is paid on account of the purchase price of the said property, all of said mortgages shall be released of record.

Title to all of the said property shall be retained by the Sellers until the purchase price is paid; provided, however, that upon the payment of the said sum of \$70,000.00 all the personal property described in Exhibit A shall become the absolute property of the Purchasers. The Title to the Real Estate and all Grazing Permits shall be continued and thereafter held by Sellers, until paid for in full.

The Buyers agree to enter into possession of said property immediately upon the execution of this Agreement, and the delivery of notes and the mortgages covering the land described in the said Exhibits B, C, and D and to pay all taxes, water assessments, and all charges against the said property including such taxes and charges for the year 1948. To care for said land and other property in good husbandlike manner and to at all times safeguard and protect the said Grazing Permits by use and by payment of annual Grazing fees, by doing such other things as the Grazing service may require.

It is understood that there is approximately \$3,-

700.00 payable to the Kraft Cheese Company upon the purchase price of a part of the livestock described in Exhibit A, which sum is payable out of the receipts from milk sales. The Buyers agree to make said payments out of milk checks until the said purchase price is paid in full, and credit shall be given upon the purchase price for the amount so paid.

The Buyer shall not be authorized to sell or otherwise dispose of said livestock, or their increase, except upon written permission from the Sellers and upon condition that they replace the livestock so disposed of.

One-Third ( $\frac{1}{3}$ ) of the wheat grown upon said property pursuant to Lease heretofore made, or one-third ( $\frac{1}{3}$ ) of the proceeds of sale thereof for the year 1948 shall be applied on the purchase price of the property.

In the event of Buyers default in the payment of any installment of principal or interest, or in the payment of any special or general tax or assessment and such default shall continue after written notice and demand of payment for thirty days; the sellers may at their option terminate this Agreement and all payments of principal or interest theretofore made shall be applied as liquidated damages for the use and occupation of said premises, and the Sellers may re-enter and take possession of said property without Legal process, and may enforce the said mortgages. All improvements shall become a part of the real Estate.

Upon receipt of full payment of principal and

interest the Sellers agree to execute and deliver to the Buyers a good and sufficient Bill of Sale of the personal property and Warranty Deed to the Real Estate with Abstracts showing marketable Title thereto.

It is agreed that the Buyers accept the said property in its present condition and that there are no representations, covenants or agreements between the parties hereto, except as herein set forth.

In Witness thereof the parties hereto have set their hands this 12th day of May, 1948, in duplicate.

PERRY E. BURNHAM,  
L. EARL BURNHAM,  
Sellers.

CARL H. RANDELL,  
EDWARD RANDELL,  
ORIEL RANDELL,  
Buyers.

/s/ J. D. SKEEN,  
Witness.

It is agreed that installment payments as provided in the fourth paragraph shall begin Dec. 15, 1949, and shall be due Dec. 15 of each year thereafter until purchase price is paid.

Dated 3, 1948.

/s/ PERRY E. BURNHAM,  
/s/ L. EARL BURNHAM,  
/s/ CARL H. RANDELL,  
/s/ EDWARD RANDELL.

## Inventory Cove Ranch

April 14, 1948

Sheet No. ....

Called by .....

Entered by .....

Price by .....

Department .....

Location .....

Extended by .....

Examined by .....

## Quantity

## Description

16	Holstiens, steers, Yearlings
12	Holstien heifers, Yearlings
2	Guernsey cows, 3 & 4 Years old
2	Jersey cows, 2 Years old
34	Holstein cows, 2 to 4 Years old
1	Purebred Holstein bull, 4 Years old
18	Holstein calves, 1 wk. to 4 mos. old
14	Holstein springer cows and heifers
33	10 gallon milk cans
2	10 Can milk coolers
7	Head draft horses, 3 to 12 years old
2	Saddle horses, 3 to 6 yrs. old
5	Colts, 1 to 3 years old
2	Saddle mares and colts
1	Model Allis Chalmer Tractor (C)
1	Model WC Allis Chalmer Tractor
1	Rubber-tired wagon and rack
1	Case hay baler
1	David Bradley hay loader

1	Case side delivery rake
1	International side delivery rake
1	6 Ft. Martin ditcher
1	3 bottom International plow
2	Sets harnesses
1	Twin 7 Mowing machine
50	Bundles baling wire
45	Bundles No. 1 cedar shingles
20	Ton lump coal
12	Pitchforks and shovels
3	Iron Crow bars
1	Pr. Wire stretchers
1	Hay derrick
100	Burlap sacks
1	4-unit milking machine
700	AUM Taylor Grazing
3,313	Deeded Land (Cove Ranch)
4,890	Inches Decreed Wood River water
5,400	Inches By-pass water for 24-hour period
1	5-room house
1	4-room house
All	Out buildings, sheds and corrals.

The above-figures and amounts are approved as correct.

By /s/ JACK B. LAYTON.

Gannett, Idaho, October 27, 1948.

Mr. Carl Randell, Please take 1-Holstein Bull to Twin Falls Stockyards Auction Sale.

Also 16 grade-Holstein 2 year steers, 1 grade guernsey cow, 6 Holstein cows. Have check made to



Perry E. Burnham and mail to Perry E. Burnham,  
515 3rd Ave., Salt Lake City, Utah.

Very truly yours,

/s/ PERRY E. BURNHAM.

Affidavit of Mailing Attached.

[Endorsed]: Filed August 22, 1949.

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[Title of District Court and Cause.]

### ANSWER TO AMENDED COMPLAINT

Come now the defendants above named and make answer to the Amended Complaint herein as follows:

1. Defendants are not advised as to the matters and things set forth in paragraph No 1, and for want of information deny the same.

2. Making answer to paragraph No. 2, these defendants deny that they employed plaintiff on the 29th day of April, 1948, to procure a purchaser of real estate for them and deny that they signed a contract of employment on the said 29th day of April, 1948, or at any time prior to the 15th day of May, 1948. Defendants admit that they signed the instrument set out in paragraph No. 2 and allege that they were wrongfully induced to sign said instrument as hereinafter more fully set out.

3. Defendants deny that plaintiff procured pur-

chasers for said real estate who were able to purchase said property. Admit that they signed the agreement attached to the Amended Complaint as Exhibit A and allege that they were wrongfully induced to sign the said contract, Exhibit A by the misrepresentations of the plaintiff as hereinafter more fully set out.

4. Admit that they made the agreement with the said Carl H. Randell, Edward Randell and Oriel Randell set out in paragraph 4, and allege that they made said agreement for the reason that the said Carl H. Randell was in possession of their said property; that he had secured possession thereof through misrepresentations on the part of this plaintiff, and it was necessary for these defendants to repossess the said livestock and to save them from further losses because of misrepresentations hereinafter more fully set out.

5. Admit that the said Carl H. Randell, Edward Randell and Oriel Randell entered into possession of the said property shortly after the 15th day of May, 1948, and allege that the said Oriel Randell and Edward Randell withdrew from the management thereof immediately thereafter and that the said Carl Randell continued in possession of the said property from shortly after the 15th day of May, 1948, to the month of November, 1948, and allege that the said Carl Randell farmed part of the said property for his own use and benefit, taking all of the hay and grain raised except grain raised upon land leased on a share crop basis before the making

of the said contract on the 15th day of May, 1948.

The said Carl Randell grazed and fed a large number of cattle claimed to be owned by him on said property and fed and milked the milking stock included in the agreement set out in paragraph No. 4, and applied a part of the proceeds from the sale of milk upon an indebtedness to the Kraft Cheese Company. After the signing of the agreement set out in paragraph No. 4 on directions of these defendants and for compensation, the said Carl Randell delivered cattle to the purchasers thereof and these defendants received the proceeds from the sale of the said cattle.

6. Admit that the said Carl Randell made changes in the dwelling house on the said ranch and installed equipment therein and allege upon abandoning said premises, in 1948, and the Spring of 1949, the said Carl Randell removed from the said dwelling house substantially all he had added thereto.

7. Admit that they received the proceeds from the sale of cattle repossessed. Admit that they received the net rentals on property leased before the making of the contract of sale to the said Randells and allege that as a part of the settlement with the said Randells, the said Randells agreed to pay them the sum of \$6,000.00 and allege that the consideration therefor was in part thirty head of cattle belonging to these defendants and in the possession of the said Randells. Deny that the said sum of \$31,983.93 or any other sum has been forfeited by



reason of the sale of the said property to Randells. These defendants deny that they profited from said sale, but on the contrary, that because of the misrepresentations as hereinafter further set out, they suffered damages greatly in excess of the ability of the said Randells to pay, and allege that they terminated said contract by mutual agreement to minimize damages already suffered and to avoid suffering further damages.

8. These defendants admit that they made a contract for the sale of the said land after the termination of the contract of sale by the said Randells.

Further answering the said Amended Complaint, these defendants allege:

1. That prior to the 14th day of May, 1948, plaintiff represented that he had procured purchasers of the said Cove Ranch and requested defendants to meet him and the prospective purchasers at Eden, Idaho. That on or about the 15th day of May, 1948, defendants met the said plaintiff and Carl Randell, Edward Randell and Oriel Randell at Boise, Idaho, and plaintiff represented to the defendants that Oriel Randell was the owner of a farm at Eden, Idaho, which defendants had examined; that Carl H. Randell was the owner of a farm at New Plymouth, Idaho, and that Edward Randell was the owner of a farm at Parma, Idaho; that the said farms were free of mortgage indebtedness and proposed that the defendants sell the said Cove Ranch to the said Randells and take, as security

for the payment of approximately one-half of the purchase price thereof, the negotiable promissory note of each of the Randells for the sum fo \$25,-000.00, secured by a Mortgage for the amount of the note on each of their respective farms. That defendants, believing that said farms were free from indebtedness as represented by said plaintiff, accepted the said proposal subject to inspection of the farms of Carl H. Randell and Edward Randell, and plaintiff directed the defendants to a farm at New Plymouth, Idaho, which plaintiff represented was owned by Carl Randell, and to the farm of Edward Randell, at Parma, Idaho, and accompanied them in the inspection of said farms, after which the contract, Exhibit A, was drawn and signed and simultaneously, the contract of employment of the plaintiff as real estate agent set out in paragraph No. 2, with the notation at the end thereof, was drawn, signed and delivered to the plaintiff.

2. Said plaintiff and the said Randells, pursuant to the terms of the said contract, Exhibit A, undertook and agreed to provide descriptions of their respective farms and a record showing the status of the titles to each of the said farms, after which they agreed to execute and deliver the said mortgages. The plaintiff and the said Randells failed and neglected to furnish the said records and thereafter, on or about the 30th day of June, 1948, defendants procured such records and then found that the said Carl H. Randell was not the owner of the farm exhibited to the defendants, or any farm whatso-

ever. That the farm of the said Edward Randall was subject to a mortgage of approximately one-half of its value. That the title to the farm of the said Oriel Randell was in the name of his deceased wife, and said property was subject to a mortgage of approximately \$5,000.00 and parts of the said farm were being purchased upon contract upon which there was a large amount unpaid.

Immediately after the signing of the said contract, Exhibit A, the said Carl H. Randell, Edward Randell and Oriel Randell went into possession of the said Cove Ranch soon after which the said Edward Randell and Oriel Randell withdrew from the management thereof and entrusted the entire supervision and management to the said Carl H. Randell. On or about the 12th day of August, 1948, it became apparent to these defendants that the said Randells were without sufficient feed for the livestock included in the contract of sale and were without the means of caring for said property and to avoid loss of cattle and damages these defendants made a contract with the said Randells for the return to them of the cattle described in the said contract set out in Paragraph 4 and defendants thereupon repossessed said property and from time to time, sold the same. That the said Carl Randell made delivery of the cattle upon sale made by these defendants, and the defendants collected the proceeds of the sales.

4. During the month of November, 1948, the said Carl H. Randell abandoned the said Cove Ranch

and took up his residence elsewhere and during the winter of 1948-49, the said Randells left the said ranch and all personal property thereon without a custodian and great damages to the said personal property and ranch were sustained by reason thereof, and on the 4th day of April, 1949, the said Randells notified these defendants that they were unable to go on with the said contract of purchase and the said contract was cancelled by the agreement set out in paragraph No. 7.

5. That the plaintiff assumed to know that the titles to the farms of the said Oriel Randell and Edward Randell were free from liens and encumbrances and that the said Carl H. Randell was in fact the owner of the farm shown to them by the said plaintiff. That he took these defendants to the said farms, represented to them that the said farms were owned by the said Randells and free from indebtedness. That these defendants relied upon the said representations, and believed them to be true, and would not have signed the said contract of employment set out in paragraph No. 2 or the contract of sale of said land attached to the Complaint, as Exhibit A, and would not have let the said Carl H. Randell, Edward Randell and Oriel Randell in possession of said real estate and personal property but for said representation; that said representations were false and known by the said plaintiff to be false or they were made by the said plaintiff to the defendants in reckless disregard of the truth. That the farm of the said Edward Randell was mortgaged



for approximately one-half of the value thereof; that the farm of the said Oriel Randell was in the name of his deceased wife and parts were being purchased upon contracts and was subject to a mortgage and contract indebtedness in sums aggregating approximately 50 per cent of its value, and the farm shown to them as being the property of the said Carl Randell was not owned by the said Carl Randell.

After signing said contract, Exhibit A, and permitting the said Randells to go into possession of said property, defendants made every reasonable effort to minimize their losses by making the contracts for the return to them of the said cattle and for the cancellation of the contract. No forfeitures were made and no profits were derived by these defendants from said transaction, on the contrary these defendants suffered damages by reason thereof.

Wherefore, defendants pray that plaintiff take nothing by his Complaint and that they have their costs herein.

/s/ J. D. SKEEN,  
SKEEN, BOYLE & RUSSELL,  
Attorneys for Defendants.

State of Utah,  
County of Salt Lake—ss.

Perry E. Burnham, being first duly sworn, deposes and says:

That he is one of the defendants above named; that has read the foregoing Answer to Amended Complaint, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

/s/ PERRY E. BURNHAM.

Subscribed and Sworn to before me this 30th day of August, 1949.

[Seal]      /s/ EMILY URRY,  
Notary Public.

My Commission expires May 14, 1953.

Affidavit of mailing attached.

[Endorsed]: Filed August 31, 1949.



In the United States District Court, District of  
Idaho, Southern Division.

No. 2674

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and  
L. EARL BURNHAM,

Defendants.

Appearances:

E. B. TAYLOR, ESQ.,  
Hailey, Idaho.

W. G. BISSELL, ESQ.,  
Gooding, Idaho.

BRANCH BIRD, ESQ.,  
Gooding, Idaho,

Attorneys for the Plaintiff.

J. D. SKEEN, ESQ.,  
Salt Lake City, Utah

OSCAR W. WORTHWINE, ESQ.,  
Boise, Idaho,

Attorneys for the Defendants.

OPINION

June 14, 1950

Clark: District Judge.

The Plaintiff alleges in his amended complaint that he is, and was at all times mentioned in the

complaint, a real estate broker licensed under the laws of the State of Idaho, with his principal place of business at Hailey, Idaho; that on April 29, 1948, the defendants listed with him a certain ranch, together with certain personal property thereon, which ranch and personal property are described in the contract appointing plaintiff to act as agent of defendants in procuring a buyer. This "listing" contract or contract of employment was in writing and is set out in full in the complaint. It provides for a commission of 5% of the sale price of \$140,000.00, less \$1,000.00 or a total commission of \$6000.00. On May 15, 1948 the contract was modified to provide that the commission as stated in the original contract dated April 29, 1948, would be paid as follows:

"\$2,000.00 when the first \$25,000.00 is paid and \$2,000.00 when the second \$25,000.00 is paid, and the remaining \$2,000.00 when the full down payment of \$70,000.00 is paid on the purchase price of this Cove Ranch, making a total of \$6,000.00 Commission."

That while the contract was in effect the plaintiff procured purchasers who were able, ready, and willing to purchase the listed property; that defendants entered into an agreement on May 11, 1948, with these purchasers, which agreement was satisfactory and agreeable to the defendants; and that thereafter, on August 12, 1948, this agreement was modified by a new written agreement between the same parties. The original agreement and the modified agreement are set out in full in the complaint.

Plaintiff alleges further that upon the execution and delivery of the agreement dated May 11, 1948, the purchasers entered into possession of the real and personal property concerned, did certain work on the premises, made certain improvements, paid all taxes due, paid water assessments, and in general operated the property in accordance with the contract of sale existing between them and the defendants; that certain payments were made by the purchaser to defendants on the purchase price and certain credits on the account were given by the defendants to the purchasers, all in the total amount of \$31,983.93, these payment and credits being set out in detail in the complaint; and that said amount has been forfeited and paid or will be paid by the purchasers on account of the purchase price of the real and personal property; that hereafter and at the special instance and request of the defendants, and without the knowledge, consent or approval of the plaintiff, the defendants entered into an agreement with the purchasers whereby it was voluntarily and mutually agreed between the defendants and the purchasers that the contract of sale should be terminated and possession restored to the defendants. In other words, plaintiff alleges that the contract of sale was cancelled without his knowledge or consent. Plaintiff further alleges that the defendants thereafter sold the property to some third person; that no part of plaintiff's commission of \$6,000.00 has been paid, though demand has been made upon the defendants and each of them for the payment thereof; wherefor plaintiff prays that he have

judgment against the defendants, and each of them, in the amount of \$6,000.00 with interest thereon at the rate of 6% per annum from April 4, 1949, and for costs of suit.

In their answer to plaintiff's amended complaint, defendants make certain denials and certain admissions, but principally and substantially they admit that plaintiff was their agent in the purported sale of the property but allege that they were wrongfully induced to sign the agreement making plaintiff their agent and that they were wrongfully induced to sign the contract of sale, in that plaintiff made misrepresentations as to the ability of the purchasers to comply with the terms of the contract of sale. Specifically, defendants allege that plaintiff made misrepresentations in the following particulars: That on or about May 15, 1948, plaintiff represented to defendants that one of the purchasers, Oriel Randall, was the owner of a farm at Eden, Idaho whereas the title to the farm was actually in the name of his deceased wife and the property was subject to a mortgage of approximately \$5,000.00 and parts of the farm were being purchased under contract upon which there was a large amount unpaid; that plaintiff at the same time represented to defendants that another of the purchasers, Carl H. Randall, was the owner of a farm at New Plymouth, Idaho, which plaintiff exhibited to defendants as Carl H. Randall's farm, whereas he was not the owner of the farm exhibited or of any farm whatsoever; that plaintiff at the same time represented to defendants that another of the purchasers, Edward Randall, was the owner of a farm at Parma, Idaho.



whereas the property was in fact subject to a mortgage of approximately one-half of its value; that plaintiff represented such farms to be free of mortgage indebtedness and proposed that the defendants sell the property here concerned to the purchasers and take, as security for the payment of approximately one-half of the purchase price thereof, the negotiable promissory note of each of the three purchasers for the sum of \$25,000.00 to be secured by a mortgage for the amount of the note on each of their respective farms; that defendants accepted the proposal because they believed, from the representations made by plaintiff, that the farms were free from indebtedness; that the purchasers agreed to execute and deliver mortgages on their farms; that they did not do so, although they went into possession of the defendants' ranch and personal property immediately after signing the contract of sale. Defendants admit entering into the modified agreement, or contract of sale, on August 12, 1948, with the purchasers; and admit the cancellation of the contract. They deny that any forfeitures were made by the purchasers and they allege that no profits were derived by the defendants from the transaction, and that on the contrary the defendants suffered damages by reason thereof.

Narrowed down, the issue in the case is this: Plaintiff claims his commission under his contract of employment, alleging that he procured bona fide purchasers and that a bona fide sale was made to these purchasers procured by him. Defendants admit that plaintiff was employed as their agent and

that he procured purchasers, but allege that the purported transaction was induced by material misrepresentations by the plaintiff, on which the defendants relied; that the representations were false and were known by plaintiff to be false or were made by the plaintiff in reckless disregard of the truth; that there was therefore no bona fide sale and the plaintiff did not earn a commission. The alleged misrepresentations related to the ability of the purchasers to furnish mortgages on the three farms as referred to earlier herein.

The evidence *is* conclusive that two of the purchasers, Oriel Randall and Edward Randall, did execute and deliver mortgages on their respective farms as agreed in the original contract of sale. These two mortgages are, in fact, still held by the defendants. It is also conclusive from the evidence that by agreement dated August 12, 1948, the earlier agreement pertaining to the furnishing of mortgages by each of the three purchasers on their respective farms was modified by mutual agreement of the defendants and the purchasers to provide for certain other securities in lieu of the mortgage which, under the original agreement, Carl Randall was to have executed and delivered to the defendants. It cannot be doubted that by entering into this modified agreement the defendants acquiesced in the substitution of securities and waived any right they might have had to rescind the original contract of sale. In short, as late as the date of this modified agreement, August 12, 1948, defendants still regarded the Randall brothers as bona fide purchasers, "able,



ready and willing'' to buy the property. It must also be noted that at the time the contract of sale was cancelled by mutual agreement of the defendants and the purchasers, the purchasers were not in default on the contract in any respect, the only previous default having been waived by defendants as discussed above. It is clear from the evidence that the agreement to cancel the contract was entered into without the knowledge, consent or approval of the plaintiff.

There is some dispute as to how much was paid by the purchasers on the purchase price. Exhibits 14 and 15 show payments and credits totaling \$22,383.16; it would appear from other evidence to amount to well in excess of \$25,000.00.

The pertinent facts are that plaintiff was engaged by defendants, under a contract in writing, to sell certain property; that he procured purchasers, an agreement was entered into and later modified; that the purchasers went into possession of the property immediately following execution of the original agreement; that the purchasers made substantial payments on the purchase price, the exact amount of which is subject to dispute; that subsequently, and while the purchasers were not in default on their contract to purchase, the contract was cancelled with the mutual consent of defendants and purchasers and without the knowledge, consent or approval of the plaintiff.

The question before the Court is the rights of a real estate broker to his commission under the state of facts existing here. The general rule is that after

a contract between the principal and a customer produced by the broker has been concluded, its subsequent modification or cancellation does not defeat or affect the right of the broker to a commission, unless it is done at his request or with his consent or knowledge and acquiescence.

The Court is of the opinion that the plaintiff was free from misconduct in his dealings with the defendants, also if there was any misunderstanding the defendants acquiesced therein when they entered into the modified agreement with the purchasers after acquiring actual knowledge of the failure of Carl Randall to deliver the mortgage on his farm, and any claims of misrepresentation were thereby waived, and that the case at bar falls within the general rule just stated. It is true that the contract of employment on which plaintiff relies provided for the payment of commissions pro rata as the purchase price was paid and that \$2000.00 of the commission was to have been paid when \$25,000.00 was paid on the purchase price. If plaintiff's recovery were to be limited by this provision of the contract of employment, it would be of primary importance to determine exactly how much was actually paid in the form of cash and credits. However, the rule has been laid down that where a broker's contract with the owner provides for payment of commissions pro rata as the purchase price is paid, the broker is entitled to his entire commission upon cancellation of the owner's contract with the purchaser by mutual consent of the owner and purchaser when the contract is cancelled without any agreement with the

broker, at least where the purchaser is not yet in default. *Ratzlaff v. Trainor-Desmond Co.*, 183 Pac. 269. This rule is applicable to the case at bar, for the defendants have abandoned their contract of sale and have made it impossible to carry out the contract with the purchasers procured by the plaintiff. The cancellation of the contract by mutual consent of the defendants and purchasers was no concern of the plaintiff. If he earned a commission at all, he earned it on the full price for which the property was sold, and his commission could not be reduced by the subsequent transaction.

It is therefore immaterial as to what amounts have been paid or credited and are yet to be paid on the purchase price, except in so far as the payments and credits indicate the bona fide nature of the transaction and show that the purchasers were not in default at the time the contract was cancelled. Plaintiff is entitled to recover his full commission; interest will be allowed from date of judgment.

Counsel for Plaintiff will prepare findings of fact, conclusions of law and decree and serve copy on opposing counsel; submitting the original to the Court for approval.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing before the court sitting without a jury at Boise, Idaho, February 8, 1950, plaintiff appearing in person and by his attorneys, E. B. Taylor and Bissell & Bird, and the defendants appearing in person and by their attorneys, J. D. Skeen and Oscar W. Worthwine; and the court having heard and considered oral and documentary evidence, and having considered written briefs, and having heard and considered oral arguments, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

### Findings of Fact

#### 1.

That at all times hereinafter mentioned the plaintiff was a real estate broker, duly licensed by the laws of Idaho, and with his principal place of business at Hailey, Idaho.

#### 2.

That on April 29, 1948, the plaintiff was employed by the defendants, under a contract in writing, to sell certain real and personal property, generally known as the Cove Ranch situated in Blaine County, Idaho; that copy of said contract or listing appears as a part of paragraph two of the amended complaint, such contract constituting the plaintiff an



agent of the defendants with authority to sell said ranch and the equipment and livestock thereon for the sum of \$140,000, and providing that the plaintiff should receive a commission of \$6,000 in the event he sold said property.

3.

Thereafter the plaintiff contacted Randall Bros. and interested them in purchasing the property so listed with the plaintiff by the defendants, and after preliminary negotiations and discussions, and inspection of the ranches owned by the Randall Bros. an agreement satisfactory to the defendants was entered into by the defendants as sellers, and Carl H. Randall, Edward Randall, and Oriel Randall, as purchasers, under date of May 12, 1948; that a copy of the latter agreement appears as Exhibit "A" to the amended complaint, the substance thereof being that defendants sold to said Randall Bros. the Cove ranch, comprising 3,313 acres of irrigated, pasture, and ranch lands, together with the livestock and farm machinery situate thereon (such personal property being listed in a written inventory prepared at the time of said sale) together with water and grazing rights and all appurtenances; that the purchase price stated in said agreement was \$140,000, of which \$70,000 was required to be paid on or before two years from date, and the balance was required to be paid in six annual installments beginning May 15, 1949, with interest at 4%; that by a supplemental agreement to said contract, dated December 3rd, 1948, the contracting parties agreed that the installment so maturing May 15, 1949.

should be postponed until December 15; this agreement of May 12, 1948, also required the Randall Bros. to secure said payment of \$70,000 with their respective individual notes, secured by mortgages on the ranches then owned by said Randall Bros.; and said agreement also contained directions for application upon said purchase price of the landlord's share to be received from sale of grain from portions of said Cove ranch then under lease, and also for application thereon of payments upon an account in favor of the Kraft Cheese Co. against certain of the livestock on said ranch.

## 4.

Concurrently with the execution of this purchase agreement a supplement was added to the listing or broker's contract between the plaintiff and defendants providing that the \$6,000 real estate commission should be paid \$2,000 when the first \$25,000 was paid upon the purchase price of said property, \$2,000 when the second \$25,000 was paid upon said purchase price and the remaining \$2,000 when the balance of said \$70,000 installment upon said purchase price should be paid.

## 5.

That shortly after the execution and delivery of said agreement between the defendants and Randall Bros., the Randall Bros. entered into possession of said Cove ranch and personal property sold therewith, farmed said ranch and cared for said personal property; that Randall Bros. made substantial pay-



ments on the purchase price, the exact amount of such payments being in dispute, it appearing from the evidence that the total of the payments and the credits on said agreement amounted to well in excess of \$25,000; that Randall Bros. plowed or disced some two hundred acres, made certain improvements on the dwelling houses, paid taxes and water assessments, and proceeded with the operation of said ranch and property themselves or by their authorized agents.

## 6.

That Edward Randall and Oriel Randall executed and delivered notes and mortgages on their home ranches as provided for by the agreement of May 12, 1948, which mortgages are still in effect; that Carl H. Randall not having executed and delivered note and mortgage on his ranch, the defendants and Randall Bros., on the date of August 12, 1948, entered into a modified agreement providing for certain other securities in lieu of the mortgage not given by Carl H. Randall; that a copy of such modified agreement appears as a part of paragraph four of the amended complaint, under the terms of which it was agreed that certain livestock should be sold and proceeds applied on the purchase price of said ranch and property, which sale proceeds should stand in lieu of the mortgage security which Carl H. Randall had not furnished on his home lands, and such modified agreement further provided that the agreement of May 12, 1948, "as herein modified shall be deemed to be in full force and effect."

## 7.

That on the date of April 4, 1949, at a time when said purchasers (the Randall Bros.) were not in default on the contract of purchase in any respect, the defendants and the Randall Bros. entered into an agreement copy of which appears in paragraph seven of the amended complaint, whereby it was agreed that the Randall Bros. should execute and deliver to the defendants a quitclaim deed for said ranch and personal property, and turn over immediate possession of all said property to the defendants, and it was further agreed thereby that upon payment of the sum of \$6,000 to the defendants by the Randall Bros., the defendants would cancel and discharge the notes and mortgages of Edward Randall and Oriel Randall and the note of Carl H. Randall, each of said notes being in the principal sum of \$25,000; and that upon the execution and delivery of said agreement the Randall Bros. relinquished possession and control of said ranch and personal property, and it was mutually agreed between the defendants and the Randall Bros. that said agreement of purchase should be mutually cancelled and terminated.

## 8.

That the mutual rescission of the agreement of April 4, 1949, was entered into between defendants and Randall Bros. without the knowledge, consent, or approval of the plaintiff.

## 9.

That by entering into said mutual release and

cealment, or misrepresentation in all said dealings with the defendants.

## 10.

That by entering into said mutual release and rescission with Randall Bros. the defendants have abandoned said agreement for the sale of said ranch and property under the terms of the contract of May 12, 1948, and the modification of such agreement had under date of August 12, 1948, and have thereby relieved Randall Bros. (Edward Randall, Oriel Randall and Carl H. Randall) of the necessity and obligation of making further payments of the installments upon the purchase price of said Cove ranch and personal property so sold to Randall Bros., and have thereby, without plaintiff's knowledge, consent or approval, terminated the chain of events designed by the pertinent contracts to mature and make payable the installments of plaintiff's real estate commission.

## 11.

That no payment has been made upon the plaintiff's real estate commission by the defendants, or either thereof, and there is now due and owing from the defendants to the plaintiff on account thereof the sum of \$6,000, with interest at 6% per annum from the date of the judgment in this case.

## Conclusions of Law

## 1.

The plaintiff, J. Harold Abegglen, was the procuring cause in effecting the sale of the Cove ranch, with livestock, machinery, etc., by the defendants to Edward Randall, Oriel Randall, and Carl H. Randall.

## 2.

The execution and delivery of the agreement for the sale of the ranch, livestock, machinery, etc., by the defendants to the Randalls, May 12, 1948, and the modified agreement between the same parties, August 12, 1948, constituted conclusive proof that the defendants were satisfied with the qualifications of the Randalls as purchasers and of their ability to perform the contracts.

## 3.

The plaintiff was not guilty of misconduct toward his principals, the defendants, nor did he conceal material facts from his said principals, nor did he make misrepresentations to his said principals, in effecting the sale of said property to the Randalls.

## 4.

By the execution and delivery of the modified agreement of August 12, 1948, the defendants acquiesced in the substitution of securities for the mortgage which Carl H. Randall had not given, and the defendants thereby waived any right that they may theretofore have had to rescind the original contract of sale of May 12, 1948, on account of any

claimed misconduct, concealment, or misrepresentation of the plaintiff in effecting the sale of said property for the defendants.

## 5.

After being fully advised that Carl H. Randall did not have a deed for his ranch, and after said Randall did not give a mortgage as required in the original agreement of May 12, 1948, the defendants by entering into the modified agreement of August 12, 1948, and also by entering into new arrangements and engagements concerning the subject matter of the contract are deemed to have and have waived the right to successfully assert any misconduct, misrepresentation or concealment on the part of the broker in bringing about the sale of said property.

## 6.

By making the agreement of April 4, 1949, delivering possession of the Cove ranch and remaining personal property to the defendants and relieving the Randalls of the obligation to pay the balance of the contract purchase price upon said ranch, without the knowledge, consent or approval of the plaintiff, and at a time when the Randalls were not in default on the contract of purchase in any respect, a mutual compromise and rescission was effected, the defendants abandoned the sale of said property, the making of further payments upon the purchase price was obviated, and plaintiff's full commission was forthwith matured and became payable.



7.

That the plaintiff is entitled to judgment against defendants for the sum of \$6,000, with interest at 6% per annum from the date of judgment.

Dated at Boise, Idaho, June 27th, 1950.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed July 3, 1950.

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In the District Court of the United States in and  
for the District of Idaho, Southern Division

No. 2674S

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and  
L. EARL BURNHAM,

Defendants.

### JUDGMENT

This cause came on regularly for hearing before the court sitting without a jury at Boise, Idaho, February 8, 1950, plaintiff appearing in person and by his attorneys, E. B. Taylor and Bissell & Bird, and the defendants appearing in person and by their attorneys, J. D. Skeen and Oscar W. Worthwine; and the court having heard and considered oral and documentary evidence, and having considered



writtten briefs, and having heard and considered oral arguments, and having made findings of fact and conclusions of law, and being fully advised on the premises;

It is hereby ordered, adjudged and decreed that the plaintiff, J. Harold Abegglen, have and recover judgment against the defendants, Perry E. Burnham and Earl Burnham, and each of them, for the sum of \$6,000, with interest thereon at the rate of 6% per annum from the date hereof, and for costs of suit taxes at \$151.70.

Dated at Boise, Idaho, June 27th, 1950.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed July 3, 1950.

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CLERK'S CERTIFICATE

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing documents and pleadings, together with the Judgment (entered in Civil Order Book No..... at page.....), constitute the Judgment Roll in this cause, under the rules of this Court.

Witness my hand the seal of said Court this 3rd day of July, 1950.

ED. M. BRYAN,  
Clerk.

[Title of District Court and Cause.]

### NOTICE TO APPEAL

To the Above Named Plaintiff and to Bissell and Bird and to E. B. Taylor, His Attorneys, and to the Clerk of the Above-Entitled Court:

You and each of you will take notice that the defendants, Perry E. Burnham and L. Earl Burnham, hereby appeal from the Judgment made and given in the above-entitled court in favor of the above named plaintiff and against the above named defendants on the 3rd day of July 1950, to the United States Court of Appeals for the Ninth Circuit.

This appeal is taken from the whole of the said Judgment and on questions of law and fact.

Dated this 27th day of July, 1950.

/s/ J. D. SKEEN,

/s/ PERRY E. BURNHAM,

Attorneys for Appellants, Perry E. Burnham and L. Earl Burnham.

[Endorsed]: Filed July 27, 1950.

In the United States District Court, for the District  
of Idaho, Southern Division.

No. 2674

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and

L. EARL BURNHAM,

Defendants.

Appearances

E. B. TAYLOR, ESQ.,

Hailey, Idaho

BRANCH BIRD, ESQ.,

Gooding, Idaho

W. G. BISSELL, ESQ.,

Gooding, Idaho,

Attorneys for the Plaintiff.

J. D. SKEEN, ESQ.,

Salt Lake City, Utah

OSCAR W. WORTHWINE, ESQ.,

Boise, Idaho,

Attorneys for the Defendants.

TRANSCRIPT

This matter came on for hearing before the Honorable Chase A. Clark, U. S. District Judge, sitting without a jury, at Boise, Idaho, on February 8, 1950.

February 8, 1950, 2:00 o'clock p.m.

Statement of the case made by Mr. Bird, Reported, but not transcribed.)

J. HAROLD ABEGGLEN

called as a witness by the Plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Bird:

Q. Will you state your name?

A. J. Harold Abegglen.

Q. Where do you reside?

A. Hailey, Idaho.

Q. You are the Plaintiff in this case?

A. Yes, sir.

Q. What business are you in?

A. The real estate business.

Q. How long have you been in that business?

A. Since 1947.

Q. Were you in the real estate business in Blaine County in 1948?      A. Yes, sir.

Q. Were you licensed as a real estate broker under the Idaho laws.      A. Yes, sir. [1\*]

Q. And did you have a license for that year?

A. Yes, sir.

Q. Handing you paper which is marked Exhibit 1, will you state what that is?

A. It is a certificate of real estate broker issued by the State of Idaho.

(Testimony of J. Harold Abegglen.)

Q. For what year?           A. 1948.

Mr. Bird: I offer this in evidence at this time.

Mr. Worthwine: No objection.

The Court: It may be admitted.

Q. Mr. Abegglen, are you acquainted with the  
Misters Burnham, the Defendants in this action?

A. Yes, sir.

Q. When did you first become acquainted with  
them?

A. When they came to my office at Hailey in the  
fore part of April, 1948.

Q. And what was their business at that time?

A. They came to my office one morning and  
asked me a question pertaining to the Cove Ranch;  
if I had a listing on the ranch and if I had a pur-  
chaser; I replied "Yes, I did," and they asked who  
I had listed with, and I said Mr. Leighton, and  
they said that Mr. Leighton didn't own the Cove  
Ranch; that they owned it and they said: "You [2]  
will have to deal with us if you have a purchaser."

Q. And that is the Cove Ranch described in these  
pleadings?           A. Yes, sir.

Q. Who was Mr. Leighton and what was his  
connection with this?

A. Mr. Leighton was supposedly the owner of  
the Cove Ranch; he listed the ranch with me for  
sale in April; I took the listing and began working  
on it. I took several parties over the ranch and  
explained the possibilities of it; being a resident  
of Blaine County for fourteen years I knew the  
ranch as well as Leighton did.

(Testimony of J. Harold Abegglen.)

Q. Was Mr. Leighton occupying the ranch at that time?      A. Yes, sir.

Q. What further dealings with the Burnhams did you have?

A. After that meeting they asked the names of the prospective purchasers; who they were and what they had. They suggested we have a meeting with the Burnhams sometime that month in Twin Falls, which was done.

Q. Do you have a listing with, or did you have with the Burnhams?      A. I do.

Q. Do you have that with you?

A. No, it was put in the deposition taken in Salt Lake City, Utah, in October, I believe.

Mr. Bird: We agreed that we may withdraw these exhibits. [3]

The Court: They may be withdrawn if it is agreeable with counsel.

Mr. Bird: Very well.

Q. Mr. Abegglen, calling your attention to the deposition contained in the deposition, which paper is now marked Exhibit No. 2 for identification, are you familiar with it?      A. Yes, sir.

Q. What is it?

A. My listing that Burnhams signed in person.

Q. Is that the listing you just had reference to?

A. That's right.

Mr. Bird: We offer this in evidence.

Mr. Worthwine: No objection.

The Court: It may be admitted.



(Testimony of J. Harold Abegglen.)

Q. Mr. Abegglen, calling your attention to the date on this exhibit just introduced, it is your recollection that it was signed as of that date?

A. April 29th.

Q. 1948? A. That's right.

Q. Calling your attention to the memoranda on the back of that which bears a different date, what is the explanation of that? [4]

A. The deal was closed and then a contract of sale was drawn up between the Randalls and the Burnhams, and then the question arose as to the method of payment of the commission; I agreed to take it as the installment were paid, and this addendum was put on the back of that.

Q. On the date it bears? A. Yes, sir.

Q. What other steps did you take in connection with this matter?

A. As I said before, I had several prospective buyers for the ranch; I went over the ranch with Mr. Leighton; when the Randalls became interested I corresponded with the brothers and visited their places in Eden, Parma, and New Plymouth, and became acquainted with the brothers. Then this meeting in April was held in the home of one of the brothers, R. B. Randall of Twin Falls. The two Burnham brothers, Mr. Skeen, attorney, and the Randall brothers, the question was discussed pro and con of how the ranch could be purchased, terms, etc. The meeting was adjourned in mid-afternoon and the Burnham brothers retired to their hotel and negotiations were carried on from there until eve-

(Testimony of J. Harold Abegglen.)

ning. I made several trips over to the Burnham brothers, at the Rogerson Hotel, trying to get the parties together. [5]

Q. What was the outcome of this?

A. One of the items discussed was the interest rate, the Randalls didn't want to pay more than 4% and the Burnhams wanted five or six, and finally agreed that if I would take a reduction on my commission they could agree,—I finally agreed to reduce it from five per cent to a flat \$6,000, and they agreed to pay 4% interest, and the parties got together that evening and Mr. Skeen dictated an agreement and I typed it. It was getting very late and we agreed to make a trip to the ranches in person and to come to Boise to make the final arrangements and agreement.

Q. Was anyone else present at this conversation other than these gentlemen you have mentioned?

A. Not that I know of.

Q. The Randall brothers are the three named in this contract, they were all there?

A. At the Boise meeting?

Q. At Twin Falls?

A. All there but Edward.

Q. Handing you the paper which has been marked as Exhibit No. 3, are you familiar with that?

A. Yes, sir, I am.

Q. What is that? [6]

A. That is the final agreement between the parties concerned.

(Testimony of J. Harold Abegglen.)

Q. Is this the agreement you spoke of that was dictated by Mr. Skeen and typed by you at the meeting in Twin Falls?

A. This was not typed by me. I typed a tentative agreement; this one was made up by Mr. Skeen.

Q. Do you know the signatures on that?

A. Yes, sir.

Q. Whose are they?

A. The two Burnham brothers and the three Randell brothers.

Q. Was Mr. Leighton present at this conversation at Twin Falls?

A. No, sir, he wasn't present at that meeting.

Mr. Bird: We offer this Exhibit No. 3 in evidence at this time.

Mr. Worthwine: No objection.

The Court: It may be admitted.

Q. Calling your attention to what is something of a postscript to that, in longhand, were you present when it was put on?

A. I don't think I was present at that time.

Q. Do you know whose handwriting that was?

A. Perry E. Burnham and the Randell brothers.

Q. This postscript I am talking about?

A. It looks like the handwriting of Perry [7] Burnham.

Q. Do you know whether the Randell brothers went into possession of the ranch after this contract was executed?      A. Shortly thereafter.

Q. And did they farm it during the farming season of 1948?      A. They did.

(Testimony of J. Harold Abegglen.)

Q. What was the next thing that came to your attention about this transaction?

A. I received a letter from Perry Burnham in the fore part of June asking me——

Mr. Worthwine: The letter would be the best evidence.

Q. Do you have the letter?           A. I do.

Q. I hand you now, Mr. Abegglen, paper which has been marked Exhibit No. 4, is that the letter you had reference to?           A. Yes, sir.

Q. In substance what did he request in that letter?

Mr. Worthwine: The letter would be the best evidence.

Mr. Bird: I beg your pardon,—I offer this in evidence at this time.

Mr. Worthwine: No objections.

The Court: It may be admitted. [8]

Q. I would like to ask the witness what is the substance of that letter?

A. It was requesting that I check the inventory when the Randell brothers moved on the Cove Ranch.

Q. Was that done?

A. I was there and helped every way I could in person.

Q. Is that the inventory that is attached to the contract that has been admitted in evidence?

A. I think the contract has *been* admitted, and I think the inventory has been admitted also.

(Testimony of J. Harold Abegglen.)

Q. Was this inventory a part of this deal that went with the ranch?

A. They had included all the personal property, livestock and machinery.

Q. What was the extent of that?

A. Farming machinery and livestock.

Q. How much livestock?

A. Supposedly 100 head of dairy cattle.

Q. What ages?           A. All ages.

Q. Did the Randells take possession of the property and did they proceed with the farming of it?

A. Yes, sir.

Q. Were you there and know what improvements or equipment they put on the place? [9]

A. I visited them often.

Q. What equipment did they bring on the place in addition to what was there?

A. Mr. Carl Randell brought on several pieces of equipment to farm the ranch as it should be farmed; he brought a caterpillar, a hay chopper, and several other items.

Q. What size caterpillar was that?

A. I cannot say.

Q. What did it cost?

A. Several thousand dollars.

Q. And what did the hay chopper cost?

A. Several thousand dollars too.

Q. Did they proceed with the farming that season?           A. They did.

Q. What was the next thing you heard from that transaction concerning the purchase of this place?



(Testimony of J. Harold Abegglen.)

A. After they took possession?

Q. Yes.

A. All I know is there was another amended agreement drawn between the Randells and the Burnhams, which I was not a party to.

Q. A moment ago you stated that Mr. Leighton was not present at this conference in Twin Falls, was he present later, when the ranches were inspected?

A. He was present before that, when the Burnhams requested me to come to Eden,—that was in the first of May, 1948, [10] to meet them and visit the ranch, accompanying was Mr. Jack Leighton, who was their agent. We drove to Eden and met the Burnhams, the Burnham brothers and continued on to the ranch of Oreal Randell. The Burnhams went on to Boise and left instructions to bring Leighton and Randell to the Boise Hotel and meet them there; to call Carl and Ed Randell to be present that evening; we met them at the Boise Hotel that evening and the agreement was gone over in some detail; they adjourned that evening and the next morning they went to the respective ranches; to Parma and New Plymouth.

Q. When was this contract made in May of 1948 with respect to the inspection of the ranches?

A. That was previous to the signing.

Q. You inspected the ranches when?

A. May the 12th.

Q. Did you come back to the Boise Hotel?

A. Yes, sir.

(Testimony of J. Harold Abegglen.)

Q. And was it at that time the contract was signed?

A. That is right. Mr. Leighton and I could not get accommodations in Boise and we had to go to Nampa, and we met them the next morning and went to Parma.

Q. Who was present at the conferences on May 11th and the 12th?

A. The two Burnham brothers, the three Randells and myself,—[11] Jack Leighton and Mr. Burnham's son was also there.

Q. Was Mr. Skeen also there?

A. Yes, sir, Attorney Skeen.

Q. Do you know who he was representing?

A. The Burnhams.

Q. Did the Randells have a representative, a legal representative there?      A. No.

Q. Did they have at any conference?

A. No, they relied on the integrity of Mr. Skeen.

Q. Did you assist the Randells the following year in doing some of the business of the ranch?

A. I handled practically all of the business, I paid the taxes, the water assessments, and all the other bills like that.

Q. The tax receipts, could you produce them?

A. Well, here are the irrigation district receipts, the Wood River Valley Irrigation District.

Q. Handing you a paper with two items attached by a paper clip, being marked Exhibit No. 5, will you tell us what that is?

(Testimony of J. Harold Abegglen.)

A. That is the Water Master's assessment receipt for 1948 and also the assessment of \$51.23 on that many shares of By-Pass water. [12]

Q. And here is another item?

A. The Wood River Valley irrigation assessment, it all amounts to some \$1700.00.

Q. Were these matters pertaining to the Cove Ranch, were they charges for that year?

A. That's right.

Q. Were you able to find the original tax receipts, Mr. Abegglen?

A. No, just on the water.

Mr. Bird: We offer this in evidence at this time.

Mr. Worthwine: We have no objection.

Mr. Bird: We are stapling the two other items mentioned, a total of four items, to the sheet.

The Court: Very well, they may be admitted.

Q. Mr. Abegglen, were these payments made by you on behalf of the Randell brothers?

A. Yes, sir, the Randell brothers reimbursed me for making these payments.

Q. They are the correct amounts?

A. Yes, sir.

Q. Were the taxes paid for that year?

A. Yes, sir, the taxes were paid by myself, but the receipt [13] was given to Mr. Oreal Randell, I think he has the receipt.

Q. Was any improvements done on the property, were there any improvements made in the way of water works or buildings on the ranch?

(Testimony of J. Harold Abegglen.)

A. Carl did a considerable amount of improvement on the dwelling; finishing two rooms in the house and repairing the roof, redecorating the house and putting water in the house.

Q. What about the kitchen, headgate and weir?

A. There was a weir paid for by myself, \$485.00 which was given to me by Jack Leighton.

Q. Do you know whose money that was?

A. Mr. Jack Leighton gave me the money to make the payment with.

Q. You don't know whether,—or where it came from?

A. No, sir.

Q. Who installed the weir?

A. Perhaps Cliff Leighton, I don't recall.

Q. Handing you a paper which has been marked as Plaintiff's Exhibit No. 6, are you familiar with that?

A. I am.

Q. What is that?

A. That is a modified agreement made on August 12, 1948. [14]

Q. Pertaining to this same transaction?

A. The same transaction.

Mr. Bird: I might explain that these three copies were necessary to make up one complete contract; some parties signed only one, and some parties signed another copy, so the three make up the complete contract.

Mr. Worthwine: We have no objection if the exhibit is offered.

Mr. Bird: I will offer it at this time.

The Court: Then it may be admitted.

(Testimony of J. Harold Abegglen.)

Q. This signature on the contract of August 12, 1948, are the signatures of Burnhams and Randells?

A. On this particular one, I think there is only one signature, and this was acknowledged before me, the signature of Oreal Randell, he has his agreement witnessed.

Q. And these others, Edward and Carl Randell?

A. That's right, Edward and Carl, and I believe I said the first was Oreal Randell, that is an error, I meant to say Carl Randell on this first page.

Q. Do you know where this contract was executed? A. Where it was signed?

Q. Yes.

A. At separate places, the three separate agreements at separate places, each bearing the signature of one of the [15] Randells, I surmise it was made in Salt Lake City.

Q. Were you present at any time other than the acknowledgment you refer to?

A. That is the first I knew about it.

Q. Did you take any part in the pre-contract meetings that led to the execution of this contract?

A. No, sir.

Q. What was the next important item in this chain of events, in regard to this ranch, that you participated in?

A. When I was invited to attend a meeting at Twin Falls; invited by Oreal Randell and Carl Randell, not on behalf of Burnhams but the Randells, to sit in on this agreement in April, 1949.

Q. Who was present at that meeting?



(Testimony of J. Harold Abegglen.)

A. The three Randells, the two Burnham brothers, Attorney Skeen and their son, that is, Perry Burnham's son, and myself.

Q. Was there any other person there at the proceedings? A. Not that I recall.

Q. Was Mr. McFadden there?

A. I didn't see him.

Q. Was Mr. Baldwin there?

A. I didn't see him.

Q. What was done at this conference? [16]

A. The purpose of this meeting as I understood it was to revamp the whole situation. The Burnhams required a down payment in earnest money or cash, they requested or required \$10,000.00 in cash to continue under the agreement previously in force.

Q. Was that \$10,000.00 paid?

A. Not that I recall.

Q. A few weeks preceding that had the Burnhams made any request or demand upon the Randells for refinancing or getting a loan to pay this cash?

A. As I understand it they made a request.

Mr. Worthwine: Were you present?

A. That was made known to me by the Randells.

Mr. Worthwine: We move to strike that as hearsay.

The Court: It may be stricken.

Q. I hand you a paper that has been marked as Plaintiff's Exhibit No. 7, are you familiar with that?

A. Yes, sir, I am.

Q. What is that?

(Testimony of J. Harold Abegglen.)

A. That is the agreement made between the Randells and the Burnhams on April 4, 1949.

Q. Pertaining to the same Cove Ranch?

A. That's right, the same Cove Ranch. [17]

Mr. Worthwine: We have no objection.

The Court: Was that offered, Mr. Bird?

Mr. Bird: I intended to offer it.

The Court: It may be admitted.

Q. Mr. Abegglen, were you present when this was signed? A. I was not.

Q. When was that drawn up?

A. I don't know.

Q. Were you present at that time?

A. I was not.

Q. Do you know the signatures on that instrument? A. Yes, sir.

Q. And they are whose signatures?

A. The Randell and Burnham brothers' signatures.

Mr. Bird: We offer at this time a paper which has been marked as Plaintiff's Exhibit 8, being a certified copy of a quitclaim deed from Randell Brothers to Burnham Brothers.

Mr. Worthwine: We have no objection.

The Court: It may be admitted.

Q. Did you have any conversation with Mr. Skeen at this conference of April 4, 1949, about any motive for this move or termination of this transaction?

A. Yes, sir, Attorney Skeen made the remark to me and also Randell, at Twin Falls, that if they

(Testimony of J. Harold Abegglen.)

couldn't come to [18] an agreement at that meeting that the Burnhams had a cash buyer for the ranch.

Q. Mr. Abegglen, I believe you stated that you are thoroughly familiar with the Cove Ranch?

A. Yes, sir.

Q. You have been in the real estate business for how long?      A. 1947.

Q. Have you had an occasion to buy and trade in ranch property and to act as agent in such transactions on similar property in that vicinity?

A. Yes, sir.

Q. And what, in your opinion, was the reasonable value of the Cove Ranch in April, 1949, in the condition in which it was returned from the Randells to the Burnhams?

Mr. Worthwine: We don't see the materiality of that and we object to it.

The Court: I think he may answer.

A. I would say \$100,000.00, approximately.

Q. It had been sold to the Randells for what price?      A. \$140,000.00.

Q. And between these periods had there been some changes in the values of the property?

A. A change in the livestock, the livestock had been sold, leaving the real estate and equipment.

Q. At the time this ranch was sold according to the contract in evidence some of the property was sub-let to a gentleman named,—

A. —Stelma.

Q. And were you familiar with that feature?

(Testimony of J. Harold Abegglen.)

A. I knew that he had a lease on part of the ranch.

Q. And under the transaction the landlord's share of the crops that he produced went to the purchasers?      A. That is correct.

Q. Did you visit those three Randell ranches during the negotiations?

A. I made several trips. I made a special trip to visit the three of them, at Eden, Parma and New Plymouth.

Q. Were you there more than once?

A. Twice at Parma and more than once at Eden and New Plymouth.

Q. What is the size of the ranch at Eden, that is, Oreal Randell's Ranch?

A. I think it is over 200 acres.

Q. What in your opinion was the value of that ranch at that time?      A. At least \$37,000.00.

Q. What was the size of the Carl Randell ranch?

A. 70 acres of highly cultivated land.

Q. Was it irrigated?      A. Irrigated. [20]

Q. Was the Oreal Randell ranch irrigated?

A. Yes, sir.

Q. And what would be the value of the Carl Randell ranch at the time, in your opinion?

A. He valued his property at that time at \$40,000.00.

Q. And would that be a fair and reasonable value?

A. That was very high priced land,—very productive.

(Testimony of J. Harold Abegglen.)

Q. In what district was that?

A. That was in the New Plymouth district.

Q. And what was the size of Ed Randell's ranch?

A. 160 acres, I think.

Q. And was it irrigated? A. Yes, sir.

Q. And what district was that in?

A. Parma.

Q. And what was the value of that?

A. \$30,000.00.

Q. Had you made any demand upon the defendants for the payment of your commission?

A. Yes, sir.

Q. And have they paid it? A. No, sir.

Q. Any part of it? A. No part of it.

Mr. Bird: That is all, you may inquire. [21]

### Cross-Examination

By Mr. Worthwine:

Q. You visited the Cove Ranch frequently from the time the Randells took possession until April of 1949? A. Yes, sir.

Q. How many times between November 1, 1948, and April, 1949?

A. In the winter time I had no occasion to visit it.

Q. When was the last time you visited it?

A. The exact date I cannot say,—I visited them frequently all summer and fall, during the harvest time.

Q. You don't recall that you visited it at all from the fall until the following April?



(Testimony of J. Harold Abegglen.)

A. I passed by the place several times and I visited once in the snow.

The Court: We will recess at this time for fifteen minutes.

February 8, 1950. 3:10 P.M.

Q. During the summer and fall of 1948 when you visited the ranch who was in charge of that ranch?

A. Carl Randell.

Q. Were any of the other Randells there?

A. On occasion.

Q. Any of them live there other than Carl Randell?

A. They did not.

Q. Did you visit the Cove Ranch after April of 1949?

A. Yes, sir. [22]

Q. Was there any of the Randell equipment there at that time?

A. There was equipment there, I think it was Randells.

Q. The equipment that the Randells had moved there?

A. The equipment that had belonged to the Burnhams.

Q. Did you testify to the effect that the Randells had bought a hay chopper?

A. Yes, sir.

Q. And a tractor?

A. A Crawler,—a caterpillar.

Q. What equipment was on the ranch when they went into possession in May of 1948?

A. That is in the inventory, I cannot name it exactly.

(Testimony of J. Harold Abegglen.)

Q. I will ask you if Defendants' Exhibit No. 9 is the inventory that you think you supervised the taking of?      A. Yes, sir.

Q. Do you know on whose typewriter that was typed?      A. No, sir, I don't.

Q. Do you think it was your own?

A. It could have been.

Q. Do you recall whether or not this property had been listed about a month before the Randells took possession?      A. Did I know it was listed?

Q. In the inventory, I mean,—

A. —Will you repeat that, please? [23]

Q. Was the list of the property,—let me put it this way, do you know when the typing on the first page and part of the second page in blue carbon was done?

A. Sometime previous to June the 3rd, if it was done by me.

Q. And this was the property that was on the ranch before the Randells moved any property to it?

A. That is correct.

Q. You testified there were about 100 dairy cattle?      A. Yes, sir.

Q. How many tractors?

A. Two, if I remember.

Q. Two tractors?      A. Yes, sir.

Q. Of what value were those tractors?

A. I cannot say, I never appraised them.

Q. Did you appraise the tractor and the hay chopper that were brought there by the Randells?

(Testimony of J. Harold Abegglen.)

A. Yes, I priced it on the market.

Q. When did you do that?

A. After the purchase was made by Randell.

Q. And you found the hay chopper value to be what?

A. I understand it ran to thousands of dollars.

Q. Can you give it any closer?

A. I cannot give any correct amount on either of them.

Q. What was the value of all the property that was listed in the inventory, Exhibit No. 9?

A. As I understand it the real estate was worth around [24] \$100,000.00 and equipment and livestock \$40,000.00,—that was my understanding.

Q. You have been familiar with the ranch for years?      A. Yes, sir.

Q. How much was the annual operating expenses of the Cove Ranch?      A. I cannot say that.

Q. Do you have any idea?      A. No, sir.

Q. You testified that the value of the ranch at Eden was \$37,000.00; as I recall you put that valuation on it in April, 1949, is that right?

A. Not 1949, that was 1948.

Q. How many times did you visit the ranch at Eden?

A. Half dozen times before the sale was consummated.

Q. When was the first time you visited it?

A. Sometime early in April.

Q. Was that before you met the Burnhams?

(Testimony of J. Harold Abegglen.)

A. Yes, sir.

Q. Did you look into the title of that?

A. No, sir.

Q. Do you know anything about the title of the ranch at Eden?      A. I assumed it was clear.

Q. How many times did you visit the Carl Randell ranch at New Plymouth?

A. Three times, I believe it was. [25]

Q. When was the first time?

A. The first time was the first part of May.

Q. Were you visiting it then on behalf of the Burnhams?

A. On behalf of the transaction, yes, sir, to become acquainted with the ranch and find its location.

Q. Did you become acquainted with it?

A. Yes, sir, I went over the ranch.

Q. The testimony was that at that time it was worth \$40,000.00?

A. That was the appraised valuation that Mr. Randell gave.

Q. Did it look to you to be worth that amount?

A. It looked pretty good to me.

Q. Did you know whether Mr. Randell had title to that?      A. I was advised that he did not.

Q. Were you advised who did have title?

A. No, sir, I knew that he was buying it on a contract.

Q. Did you know from whom he was buying it?

A. No, sir.

(Testimony of J. Harold Abegglen.)

Q. Ed Randell, at Parma, that place I believe you said was worth \$30,000.00? A. Yes, sir.

Q. Was there any encumbrances on that ranch?

A. Yes, sir.

Q. And what was the amount?

A. Approximately \$4,000.00, — a Reclamation lien. [26]

Q. Did you,—strike that, please,—but you did know at that time that Carl Randell didn't have title to the ranch at New Plymouth?

A. I did know that.

Q. Did you that so far as the ranch at Eden was concerned that Oreal Randell didn't have title in his name? A. I did not.

Q. In regard to the commission agreement, Plaintiff's Exhibit No. 2, when was the—did the Burnhams sign that more than once?

A. They put signatures on there twice.

Q. When was the first time?

A. April 29th.

Q. Where? A. At Twin Falls.

Q. Who was present?

A. Earl Burnham and Perry Burnham.

Q. In typing "May 1, 1948," upon that,—that has been stricken out?

A. I think it was just a misprint on the typewriter, they were to write the date in.

Q. Did you take this instrument to Twin Falls?

A. Yes, sir.

Q. And there has been typed in this instrument



(Testimony of J. Harold Abegglen.)

the words [27] "Less \$1,000.00,"—when was that typed in?

A. When I agreed to reduce my commission.

Q. And when was that?

A. In 1948 at Twin Falls.

Q. And on a part of the other side of that instrument, when was that written?

A. At the consummation of this agreement at the Boise Hotel.

Q. And who was present?

A. The Randells, the Burnhams, Attorney Skeen and Jack Leighton.

Q. Who typed it?                      A. I did.

Q. Where did you get the typewriter?

A. At the lobby.

Q. That is dated May 15th?                      A. Yes, sir.

Q. Is that the date it was signed?

A. There is a question of that date, whether it was May the 12th or the 15th, the date on the contract.

Q. Do you know which is correct?

A. I cannot tell exactly.

Q. The deal as consummated called for three mortgages—consummated in May, whether it was the 12th or 15th, in the Boise Hotel,—it provided for three mortgages as security for the payment of \$70,000.00?                      A. That is correct. [28]

Q. The mortgages were to be executed by the three Randell brothers, Oreal, Carl and Edward?

A. That is right.

(Testimony of J. Harold Abegglen.)

Q. The property to be mortgage was the \$40,000.00 ranch at New Plymouth?

A. That is correct.

Q. And the other property at Parma?

A. That's right.

Q. That was the \$30,000.00 property?

A. Yes, sir.

Q. And the \$37,000.00 property at Eden?

A. That's right.

Q. Do you know whether those mortgages were executed?      A. Two were.

Q. And which one was not?      A. Carl's.

Q. Do you know why?      A. No, sir.

Q. There was nothing paid down on this deal?

A. Not in earnest money.

Q. Had you ever seen or met Mr. Earl or Perry Burnham before this day, I believe it was April 29th, when they came to your office?

A. I didn't say it was the 29th, it was sometime in April.

Q. What time in April was it? [29]

A. I cannot say.

Q. What time of day was it?

A. It was in the morning.

Q. And who was with them?

A. The two brothers, the Burnham brothers.

Q. Was there anyone else?

A. Not that I recall.

Q. Who was present when they called?

A. Myself.

Q. And where did you see them again?

(Testimony of J. Harold Abegglen.)

A. At Eden.

Q. At Eden?

A. No, it was at Twin Falls, excuse me.

Q. That was when the first part of Exhibit No. 2 was executed?

A. That was when the agreement was typed.

Q. Where did you see them?

A. At the home of R. B. Randell.

Q. Is that another brother? A. Yes, sir.

Q. Who was present?

A. Mike Randell, Carl Randell, R. B. Randell, Jack Leighton and Mr. Skeen.

Q. Was Mr. Skeen present at that time?

A. Yes, sir. [30]

Q. Mike is the same as Oreal Randell?

A. That is right.

Q. Mr. Skeen was there? A. Yes, sir.

Q. He dictated that contract and you took it and type wrote it? A. Yes.

Q. Where was that typed?

A. At the home of R. B. Randell.

Q. That contract was never signed?

A. Not that I know of.

Q. Did you meet Mr. Perry Burnham and Earl Burnham, Mr. Skeen and Jack Leighton in Eden in April, 1948?

A. With Jack Leighton I met the two Burnham brothers and their son Robert at Eden.

Q. Where did you meet them?

A. About the center of town near the postoffice.

(Testimony of J. Harold Abegglen.)

Q. And what discussion took place there between you and the persons that you met there?

A. Just that we consented to take them over to the ranch and they followed us to the Oreal Randell ranch.

Q. At that time, at the postoffice, was the question of the title to the property brought up?

A. Not that I recall.

Q. Now, I will ask you if at that time Mr. Perry Burnham, in the presence of Mr. Skeen and in the presence of Carl [31] Burnham and Jack Leighton and Robert Burnham, asked you if Randell had a clear title to that property,—if they all had clear titles to their property?

A. Who is Carl Burnham?

Q. I meant Earl Burnham, pardon me.

A. I recall no such conversation.

Q. I will ask you if Perry Burnham asked if the Randells had clear title to their property in the presence of those persons you said were there, and if you said in the presence of those same persons, “they have good, clear title in the value of \$75,000.00 to \$90,000.00”? A. I made no such statement.

Q. After meeting these gentlemen at the postoffice where did you go?

A. We went to the ranch at Eden.

Q. And where did *you from* there?

A. They examined the ranch and were satisfied and left for Boise.

Q. How did you travel to Boise?

(Testimony of J. Harold Abegglen.)

A. They left in their car and I took Leighton and Randell with me in my car.

Q. When was that? A. That was in May.

Q. With reference to the date of the contract of the sale at the Boise Hotel, when was it? [32]

A. The day before.

Q. Did you secure a room at the hotel in Boise that night? A. No, we couldn't get a room.

Q. Did you have a meeting at Boise?

A. Yes, sir.

Q. Who was present?

A. Earl Burnham, Perry Burnham, and their son, Bob, Mr. Skeen and myself.

Q. Mr. Skeen was acting for the Burnham brothers? A. Yes, sir.

Q. As their attorney? A. Yes, sir.

Q. Did Mr. Skeen ask about the titles to the property owned by the Randells?

A. Not that I recall.

Q. He didn't ask about the title?

A. Not at that time.

Q. I will ask you if it is not a fact at that time, in the Boise Hotel, in the presence of the parties you testified to,—were the three Randell brothers present? A. That evening.

Q. Previous to the signing of the agreement?

A. Yes, they were. [33]

Q. In the presence of the three Burnhams, Perry Burnham, Earl Burnham and Robert Burnham, Mr. Skeen, and the Randell brothers, Mr. Skeen asked



(Testimony of J. Harold Abegglen.)

you if the Randells had clear title to these three ranches, and you replied that they did except the ranch at Parma, and that that ranch had a mortgage on it of about \$4,000.00?

A. That was my understanding.

Q. Did you tell them?

A. Yes, I told the Burnhams.

Q. Did you tell them the Randells had title to the other property?

A. I told them the ranches were clear except the lien they referred to and Carl didn't own his ranch, that he was buying it on a contract.

Q. Who asked the question?

A. I cannot recall.

Q. You advised the Burnhams that Carl was buying his ranch on a contract?

A. That's right.

Q. How many times did you advise them?

A. If they asked more than once I told them the same thing.

Q. Isn't it a fact that at this meeting at the Boise Hotel, the question had been asked by Mr. Skeen and your reply was that they had clear title except for Edward's ranch at Parma? [34]

A. Yes, sir, and the Carl Randell ranch at New Plymouth.

Q. Did you tell them that Oreal Randell didn't have title in his name to the ranch at Eden?

A. No, I didn't know that.

Q. What did you say about his title?

(Testimony of J. Harold Abegglen.)

A. I didn't say anything, I didn't know there was a lien against the ranch there; Oreal Randell must have told them that himself; I didn't know that fact.

Q. That he didn't have title? A. Yes, sir.

Q. But you did advise Mr. Skeen and the Burnhams that Carl didn't have title, that he was buying that ranch on a contract? A. Yes, sir.

Q. When did you find that out?

A. When I visited the ranch.

Q. Do you remember who it was that went with you to the Ed Randell ranch?

A. The same parties that went to the Carl Randell ranch, a party of five of us.

Q. Who were they?

A. Jack Leighton, myself, Earl Burnham, Perry Burnham, and their son, Bob.

Q. Was any conversation held on that trip, on the visit to Ed Randell's ranch, about a mortgage?

A. I don't think it was discussed that morning, they were on purely an observation trip of the ranches.

Q. Who was to secure the abstracts of title for those various ranches, who looked after the securing of them, or who was to do that?

A. The mortgages and the papers?

Q. The abstracts of title, were they to be secured?

A. Yes, sir, by the Randell brothers.

Q. Was there any arrangement made for you to take care of securing the abstracts of title?

(Testimony of J. Harold Abegglen.)

A. No, sir, I think the request was made of Mr. Skeen that he remain in Boise and that we go to New Plymouth and Parma,—to take care of that immediately, and he said he had to go back to Salt Lake City, and that he would type up the agreements and send them for signatures, that he would take care of it by correspondence.

Q. At the time you visited the ranch at New Plymouth and Parma, what did Mr. Skeen do?

A. He remained in Boise.

Q. Do you know what activity he engaged in in Boise?

A. No, unless it was something in connection with the agreement.

Q. He remained in Boise and drafted the agreement that was put in evidence?

A. I think there was some detail taken care of.

Q. Did Mr. Skeen ask you to secure and send to him a description of these ranches, the three?

A. No, sir, otherwise, I would have remained in Boise; he gave me the impression that he would handle that himself.

Q. Do you recall that he asked you specifically about the title, and asked you to get a description of the property and secure the abstracts brought down to date?      A. He did not.

Q. You visited the Cove Ranch in August when Mr. Skeen, Perry Burnham and Earl Burnham were there and negotiated with the Randells concerning some modification?      A. I don't recall.

Q. Do you recall in August of 1948, Mr. Skeen

(Testimony of J. Harold Abegglen.)

and the two Burnham brothers were at the Cove ranch?

A. They were there several times during the summer, I was not advised what was going on or what was being transacted.

Q. Do you remember a conversation with Mr. Skeen at the Cove Ranch?

A. No, sir, I don't recall meeting Mr. Skeen at the Cove Ranch except when the inventory was taken.

Q. Do you recall in the presence of yourself, Mr. Skeen and Mr. Perry Burnham, that Mr. Skeen asked you to help out in the negotiations?

A. No, sir. [37]

Q. Do you recall that you told Mr. Skeen that you were not interested and that you didn't know whether they were wasting your time and gasoline in calling you to the ranch?

A. I made no such statement.

Q. When did you first learn that they were negotiating for a change?

A. When I saw the amended agreement.

Q. When was that? A. After August 12th.

Q. How long after?

A. I don't know exactly.

Q. Who advised you?

A. The Randell brothers.

Q. Had you secured information that a change had to be made because Carl Randell had not signed the mortgage? A. No, sir.

(Testimony of J. Harold Abegglen.)

Q. When did you first learn that Carl Randell refused to execute a mortgage?

A. In that amended agreement I saw that he had not executed a mortgage.

Q. And that was the first information you had?

A. Yes, sir.

Q. Did you receive letters from Mr. Skeen concerning the Cove Ranch in July and August? [38]

A. I received some letters from him.

Q. Did he inform you of any change?

A. He intimated some change but not where it was to take place, or what time, or anything.

Q. Did he ask you to help him out?

A. To this extent, that I take a further reduction in my commission.

Q. The deal had not progressed according to the original arrangement,—Mr. Carl Randell had not executed the mortgage?

A. I told Mr. Skeen that I would be glad to talk it over personally, to which he refused.

Mr. Bird: We move that reference to the contents of the letters be stricken on the ground that the letters themselves would be the best evidence.

Mr. Worthwine: We will produce the letters.

The Court: Very well, you may produce them.

Q. Handing you Defendants' Exhibits Nos. 10 and 11, I will ask you if you received those letters from Mr. Skeen? A. Yes, sir.

Mr. Worthwine: We will offer them in evidence.

Mr. Bird: No objection.



(Testimony of J. Harold Abegglen.)

The Court: They may be admitted. [39]

Q. You visited Twin Falls in the spring of 1949 in connection with this Cove Ranch?

A. Yes, sir.

Q. What time in the spring?

A. I think it was around the 3rd of April.

Q. How long did you remain in Twin Falls that time?      A. One afternoon.

Q. Did you have any conversations?

A. I was invited by the Randells,—not on behalf of the Burnhams,—I was told there was a meeting and they asked me to come and attend.

Q. Where was that held?

A. At the Park Hotel.

Q. Who was present?

A. The Randell brothers, the Burnham brothers, Attorney Skeen and myself.

Q. How long did you remain there?

A. Until evening.

Q. And what was discussed?

A. The modification or the amended agreement to the original contract.

Q. Who did the talking, did Mr. Skeen?

A. Yes, he talked,—he was the mouth-piece more or less.

Q. Do you recall Mr. Perry Burnham requesting the Randells to continue in possession of the property, of the Cove Ranch? [40]

A. Only on the condition that they raise \$10,000.00.

(Testimony of J. Harold Abegglen.)

Q. That was the only amendment?

A. Yes, so we adjourned on that.

Q. It was \$10,000.00 or get out?

A. That is what they wanted.

Q. What was due on the contract?

A. There was nothing in default.

Q. The Randells insisted on going ahead under the terms of the contract?

A. Yes, sir, they would have liked to; they gave me that impression, that idea.

Q. They requested Perry Burnham and Earl Burnham to permit them to go on with the contract?

A. They asked to stay.

Q. They did at this meeting in your presence request Perry Burnham and Earl Burnham to go on with the contract?

A. Well, there was nothing in default on the contract.

Q. Did the Randells request Perry Burnham,—did Carl Randell request the Burnhams to let them go on under the contract?

A. The amendment of the contract,—the purpose was to make it possible to remain on the ranch.

Q. And why wasn't it possible to remain without an amendment?

A. They had not terminated the contract, they were not in default. [41]

Q. Had they moved off the ranch?

A. In April?

Q. In April of 1949?

A. I think so.

(Testimony of J. Harold Abegglen.)

Q. And they had taken every head of livestock off?

A. The livestock was moved off that winter.

Q. What time in the winter?

A. When the snow came.

Q. What happened with anybody that was living on the ranch?      A. Nothing that I know of.

Q. Did any of the sheds cave in?

A. It could be.

Q. What was done with the equipment?

A. Just what was there.

Q. Did any of the tractors freeze up and the cylinder heads burst?

A. Not to my knowledge.

Q. You didn't know that Randell had abandoned the ranch, had left it?

A. They just moved off for the winter,—they intended to go back in the spring and really farm,—they told me that, that was their intention.

Mr. Worthwine: I move to strike that as a conclusion of the witness. [42]

The Court: I will strike it, possibly it should be allowed to stand in the record, but I will strike it.

Q. Do you know of any other winter that the ranch was left without anybody on it, with the equipment left there?

A. Not to my knowledge, but there was nothing to stay there for, the cattle were sold, a part of them were sold, and the rest were taken care of.

Q. There was no reason to stay on this ranch with equipment for 3300 acres of land there?

(Testimony of J. Harold Abegglen.)

A. It couldn't be farmed in the winter time.

Q. At this Twin Falls meeting Mr. Skeen made the remark in April of 1949 that if they couldn't come to an agreement,—the Randells and the Burnhams,—that the Burnhams had a cash buyer for the ranch? A. Mr. Skeen made that statement.

Q. All through the discussion you heard they desired \$10,000.00 cash, that was the condition the Burnhams took?

A. That was my understanding.

Q. Did you hear the Burnhams urge the Randells to go back and farm that place under the contract as it existed? A. No, sir.

Q. What conclusion had been reached by the time you left? A. No conclusion reached. [43]

Q. When did you learn what the outcome was?

A. The next day.

Q. Where? A. At Hailey.

Q. And what did you learn?

A. I received a phone call that afternoon from Twin Falls.

Q. From whom?

A. From the Baldwin Real Estate on this cash deal, he advised me the deal was there.

Q. I am not asking you what you were advised.

Mr. Bird: I think he should be permitted to answer the question.

The Court: I think he has answered it.

Q. You testified that Mr. Leighton had given you an agency contract to sell the Cove Ranch?

(Testimony of J. Harold Abegglen.)

A. That is right.

Q. Where is that?

A. I cannot say, I thought it had no more use, the Burnhams advised me that I should deal with them and they gave me a listing.

Q. How long had you been attempting to sell under the Leighton deal?

A. The spring of 1948. [44]

Q. The same spring that you dealt with the Burnhams?

A. That's right.

Mr. Worthwine: I think that is all.

Mr. Bird: That is all.

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

February 9, 1950, 10:00 o'Clock A.M.

### OREAL RANDELL

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Bird:

Q. Where do you live, Mr. Randell?

A. Eden.

Q. What is your business?

A. Farming.

Q. How much land do you operate?

A. Thirty acres of cultivated ground, forty acres of cultivated pasture, and two hundred acres of dry pasture.



(Testimony of Oreal Randell.)

Q. About 200 acres that was used for pasture?

A. Yes, sir.

Q. What is your total acreage?

A. I think it is about 241 acres, I am not sure,—  
I mean 341 acres.

Q. How long had you been operating this ranch?

A. About 18 years.

Q. Did you prove up on your ranch?

A. No, sir.

Q. From whom did you buy it?

A. The home eighty from father.

Q. You are one of the gentlemen whose name is signed to the contract relative to the Cove Ranch?

A. Yes, sir.

Q. Were you present at a meeting when the contract was being discussed and planned,—the contract for the purchase of the Cove Ranch?

A. Yes sir, at Boise, here.

Q. Who was at that meeting besides yourself?

A. My two brothers, the two Burnham brothers, Mr. Skeen and Mr. Abegglen and also Mr. Jack Leighton, and Bob Burnham.

Q. At that meeting and during the preliminary stages of making this contract was the situation relative to your ranch discussed. A. Yes, sir.

Q. And what was the substance of that discussion concerning your ranch?

A. Well, as I remember, it was discussed if I had a loan on my property, which I told them that I did have; other than that I don't know that anything was said. [46]

(Testimony of Oreal Randell.)

Q. Was the amount of the loan mentioned?

A. Yes, sir.

Q. And what was that?

A. Approximately \$6,000.00, I think I gave it.

Q. Was Mr. Skeen and the Burnhams,—these two gentlemen (indicating) there?

A. Yes, sir.

Q. Were they present when this matter was discussed?      A. Yes, sir.

Q. What would you consider the fair market value of that ranch at that time?

Mr. Worthwine: We object to that as incompetent, irrelevant and immaterial and not the proper way to prove market value.

Mr. Bird: I think he can state what the market value of his own property was.

The Court: It is not material so far as your complaint is concerned, but it might be if you are contemplating their defense.

Mr. Bird: Perhaps we can call him later on this matter.

The Court: Very well, you may do that.

Q. After this contract for the purchase of the Cove Ranch was entered into, what did you do,—did you help to farm it in 1948? [47]

A. Not very much, I was there several times but I didn't have much to do with operating it.

Q. Your brother was up there?

A. Yes, sir.

Q. Did you make plans for taking it over in 1949?

(Testimony of Oreal Randell.)

A. Yes, sir, I leased my ranch at Eden with the intention of going up there.

Q. Do you know whether or not you or your brothers made an application to refinance?

A. Yes, sir.

Q. What was the result of that?

A. It seems as though the loan,—as far as the ranch was concerned, if all the conditions,—in other words,—when I came up to see the Prudential people there were three applications for a loan to buy the ranch and they wanted to know just who wanted to borrow the money.

Q. Who had applications to buy that ranch?

A. I think Stewart and Leighton.

Q. The applications were for a loan on the Cove Ranch?      A. Yes, sir.

Q. Did these applications purport to say who was the owner of the ranch?

Mr. Worthwine: We object to that as incompetent, irrelevant and immaterial.

The Court: Sustained. [48]

Q. What was done in the matter of operating the ranch in 1948?

A. The hay was put up,—a large portion of the ranch was leased and grain raised.

Q. Was the dairy operated?

A. Yes, sir, cows were taken care of.

Q. What was done with the dairy produce?

A. Half was applied on the indebtedness that the Kraft Cheese Company had.

(Testimony of Oreal Randell.)

Q. Whose indebtedness was that to the Kraft Cheese Company?

Mr. Worthwine: We object to that, it is assumed under the contract.

Mr. Bird: I will withdraw the question.

Q. Who owed the Kraft Cheese Company?

A. I suppose that we did after we took over the ranch.

Q. Was this indebtedness to the Kraft Cheese Company against the stock when you took it over?

A. Yes, I understood it was.

Q. Do you know how much was applied on the Kraft loan while you had the ranch?

A. No, I don't.

Q. What was done with the grain?

A. It was turned to the Burnham brothers.

Q. How much was that, do you know?

A. I would say approximately \$12,000.00. [49]

Q. And was some of the cattle sold?

A. Yes, sir.

Q. And what was done with the proceeds from that source? A. It was turned to Burnhams.

Q. Did you do any plowing on the ranch?

A. Yes, sir.

Q. How much? A. About 200 acres.

Q. Was that plowed or disced?

A. Some of it was plowed and some of it disced.

Q. Did you do any improvement on the ranch?

A. Yes, sir, to the house.

Q. How much?

(Testimony of Oreal Randell.)

A. Two rooms added on,—the interior was decorated and also a new roof,—new shingles.

Q. What was the next contact that you had with the Burnhams after the original contract was signed?

A. I don't recall in particular any one, I think I met them at the ranch the next time.

Q. You had a modified contract in August?

A. Yes, sir.

Q. You were present at that time?

A. No, I don't think I was.

Q. Do you remember the reason for the new contract being drawn? [50]

A. It was in regard to my brother's default, Carl's default on his first deal,—on the original contract,—he couldn't produce the mortgage on his property.

Q. What did you do in regard to the ranch at the end of the farming season?

A. With that much plowing done, along about December we did move the rest of the stock out and vacated the place for that winter.

Q. Was your program to return in the spring?

A. Yes, sir.

Q. Was all the stock moved off the ranch for the winter?

A. All the cattle were moved away from the ranch.

Q. You took them to your home ranch?

A. Took them to the ranch at Eden and fed them there.



(Testimony of Oreal Randell.)

Q. Did you make arrangements for a caretaker to look after the property?

A. Yes, sir, a fellow named Baldwin was to watch things and keep the snow off and so on.

Mr. Bird: That is all, you may cross-examine.

Cross-Examination

By Mr. Worthwine:

Q. Where did Mr. Baldwin live?

A. Across the highway from the entrance to the ranch. [51]

Q. Did you go back to the ranch again?

A. Yes, sir, off and on quite a few times during the winter.

Q. Did you install any plumbing in the ranch House? A. Yes, sir, I think there was some.

Q. Did it remain there or was it torn out?

A. It remained there.

Q. It was there the last time you saw it?

A. That's right.

Q. What was it in the way of plumbing that you installed?

A. I didn't have much to do with that, I cannot tell you.

Q. You don't know much about that, nor the operation of the ranch in 1948 and 1949?

A. I wasn't there so I don't know too much about it.

Q. Were you familiar with the equipment that was turned over to you and your brothers when you took possession?

(Testimony of Oreal Randell.)

A. I think I knew a little bit about it.

Q. What equipment was there when you took possession?

A. As I recall it there two tractors, a twin-7 mower, hay bailers, a couple of side rakes, milking equipment, a couple of coolers, two or three sets of harness, I think a vise and a few small tools.

Q. Some shingles? A. Yes, sir.

Q. Do you know what happened to the [52] shingles? A. Yes, sir.

Q. What was it?

A. They were applied on this account with the Lumber Company that we had done to the house.

Q. The shingles were applied on the material that went into the roof? A. That's right.

Q. You mentioned a contract modified in August, I didn't hear the reason you gave for the modification?

A. As I understand it, it was on account of my brother Carl's default in the original contract.

Q. Your brother Carl agreed to give a mortgage on his place in New Plymouth in the amount of \$25,000.00? A. That's right.

Q. Did he ever give such a mortgage to the Burnhams? A. I don't think so.

Q. He refused?

A. I don't know whether he refused, he just couldn't produce it.

Q. He just didn't do it? A. That's right.

Q. Do you recall what equipment you and your brothers moved to the Cove Ranch in 1948?

(Testimony of Oreal Randell.)

A. A Fox Chopper and wagons, a 2-D Caterpillar Crawler and Discs. [53]

Q. When were they moved?

A. In the fall of 1948,—the caterpillar wasn't brought up until after the first of the year.

Q. Where were they taken?

A. They were taken to Kimberly.

Q. Where was your brother Carl then living?

A. At Kimberly.

Q. He had moved from New Plymouth?

A. Yes, sir.

Q. And had gone to Kimberly?

A. Yes, sir.

Q. Was that in the fall of 1948 when part of this equipment that Carl Randell put on the place was removed?

A. Yes, sir.

Q. The rest of it early in June of 1949?

A. Yes, sir.

Q. You leased your ranch, you said?

A. Yes, sir.

Q. Did you deliver possession?

A. Yes, sir.

Q. To your tenant?

A. Yes, sir.

Q. How many tons of hay did you produce on the Cove Ranch in 1948?

A. I would say approximately 180 tons. [54]

Q. How many acres of hay?

A. I cannot say.

Q. How many acres are there of irrigated land in that ranch?

A. Approximately 1500 acres, I understand.

Q. You testified that you had 341 acres of land,

(Testimony of Oreal Randell.)

—in whose name was the title to that land?

A. Well, I had a Land Bank loan and I presume the title should be in my name.

Q. Was any taken in the name of your wife?

A. Well, no, she was just as husband and wife, I don't understand much about that business.

Q. Well, has there been any probate proceedings involving that land during the last two or three years?      A. Yes, sir.

Q. That was the estate of your deceased wife?

A. Yes, sir.

Q. Had the probate proceedings been started in May, 1948?      A. No, sir.

Q. When was the first time you met the two Burnhams, the defendants in this case?

A. Up here in Boise.

Q. You didn't meet with them at a meeting in Twin Falls in April?      A. No, sir.

Q. And were not present at the meeting where you or any brothers, [55] or the plaintiff were and had a conference with the defendants in this case before the one in Boise?

A. No, I believe not.

Q. Who was present at the meeting in Boise?

A. There was I, and my two brothers, the Burnham brothers, Mr. Skeen, Mr. Abegglen and Jack Leighton.

Q. That is the first time,—this meeting in Boise was the first time you ever discussed with the Burnhams the purchase of the ranch?

A. That's right.

(Testimony of Oreal Randell.)

Q. And that is the place where you agreed, so far as you were concerned, these terms were agreed upon? A. That's right.

Q. That is the place where the question of giving the three mortgages was agreed to?

A. Yes, sir.

Q. Did you advance personally any money for the payment of water charges? A. Yes, sir.

Q. In May, 1948, you sent the money to whom?

A. To Mr. Abegglen.

Q. Did you advance any money for taxes?

A. Yes, sir.

Q. Mr. Abegglen placed in evidence a copy of a letter addressed to you, do you remember whether you received [56] the original of that?

A. Yes, I believe I did.

Q. The amount of money that is mentioned in there, did you advance it? A. Yes, sir.

Q. Mr. Abegglen didn't pay those amounts personally, he paid them, but you advanced the money?

A. That's right.

Mr. Worthwine: That is all.

### Redirect Examination

By Mr. Bird:

Q. Do you have the tax receipts for those tax payments? A. No, sir.

Q. Do you remember about what it was?

A. I think about \$850.00, approximately for one-half of the taxes.



(Testimony of Oreal Randell.)

Q. That is the first half of 1948?

A. Yes, sir.

Q. Were you present at a conference that took place where you gave the Burnhams a quitclaim deed for this Cove Ranch?      A. Yes, sir.

Q. When you turned it back to them?

A. Yes, sir.

Q. Were you present at a conference in the early part of [57] April, 1949, when this situation was agreed upon?      A. Yes, sir.

Q. And at that time, or in connection with that, was any amount due on the contract?

A. No, sir.

Q. Was a demand made for the payment of money at that time?

A. They wished to know if we would be able to meet the interest due at the time of the contract.

Q. When was that?

A. I think it was around the 12th of May.

Q. What amount of money did they request you to produce?

A. I think, as I recall, it would have been \$5,400.00.

Q. Did they request any additional sum?

A. When we entered into this agreement we agreed to give them \$6,000.00.

Q. Did they make a request for an additional sum to permit the original contract to remain in effect?

Mr. Worthwine: We object to that as incompe-

(Testimony of Oreal Randell.)

tent, irrelevant and immaterial, he has testified what it was for.

The Court: He may answer.

A. No, we tried to come to some other agreement as I remember,—it would have taken another consideration to make that agreement. [58]

Q. Were you and your brothers interested in retaining the ranch under fair terms?

A. Yes, sir.

Mr. Bird: That is all.

### Recross-Examination

By Mr. Worthwine:

Q. Were you interested in retaining it under the terms of the contract then in force?

A. Under the old contract?

Q. Yes.

A. Yes, we would have went on if the conditions had not made it such that it looked like it would be better to quit.

Q. What were those conditions?

A. The main objection was my mother became ill and it was pretty near necessary for me to stay and take care of her.

Q. That illness of your mother was what prevented you from going ahead with the contract?

A. That was the main thing, and the finance that looked like it would be hard to get; if they had set the interest back and the fall payment, I think we could go ahead.

(Testimony of Oreal Randell.)

Q. But under the contract as it existed you could not?

A. We deemed it better not to go on.

Q. Who called the conference that was held in Twin Falls in April, 1949? [59]

A. I think the Burnhams.

Q. Did you telephone to Salt Lake City at any time concerning it?

A. I believe we had a conference as to where it was to be.

Q. Isn't it a fact that Mr. Perry Burnham at that conference when you signed the quitclaim deed, offered to finance you if you would go ahead with the contract as it existed?

A. I don't recall that.

Q. As far as you knew he had no right to insist on a forfeiture at that time? A. No, sir.

Q. You did discuss the payment of interest that would come due in May? A. Yes, sir.

Q. You said that you removed certain livestock from the Cove Ranch, did you take them to your place? A. Yes, sir.

Q. Of what did they consist?

A. I think it was 26 Holstein cattle.

Q. Dairy stock?

A. Young stock, calves, steers and heifers.

Q. Was it about 37 head, to refresh your memory?

A. Well, we were speaking of my place,—I think I had 26 head, there were also a few head at my brother's place. [60]

(Testimony of Oreal Randell.)

Q. Who was the owner?

A. I understood it was Mr. Burnham.

Q. In this deal that was made in May, that livestock was turned over to you?

A. That's right.

Q. You acquired title under your settlement that was made?      A. That's right.

Q. Among other things in that settlement you agreed to you \$6,000.00?      A. Yes, sir.

Q. Has that ever been paid?      A. No.

Q. When Mr. Burnham asked you if you could produce the interest in the amount of \$5,400.00 due in the month of May, what did you say?

A. I told him that it would make it very inconvenient to borrow the interest money and also the running expense on that big spread.

Q. You told him that you couldn't do it?

A. I didn't tell him that I couldn't do it.

Q. You told him that on account of the illness that you couldn't go up?

A. I told him I would rather not. [61]

The Court: How much did you pay him on this, —I think you said some \$12,000.00 out of the grain?

A. Out of the proceeds of the crops.

The Court: Do you have those figures?

A. No.

Q. Did you ever pay Burnhams any money outside of what was produced on the ranch in the way of grain and the sale of the dairy stock?

A. No, sir.

Mr. Worthwine: That is all.

(Testimony of Oreal Randell.)

Redirect Examination

By Mr. Bird:

Q. You did pay out of your own money independent of the crops, those taxes, water assessments and so forth shown in this letter from Mr. Abegglen?

A. That's right.

Q. That was additional to the payments out of the property that was there, that was from your own pocket?

A. Yes, sir.

Q. With reference to the \$6,000.00 obligation, is that due yet?

A. Yes, it was due last,—no, it will be due this coming May.

Q. The cattle you took to your ranch and your brother's place, the 26 head that you took and the few that he took, what was done with these cattle in the final windup? [62]

A. They gave me a bill of sale to them.

Q. They were turned to you and your brother?

A. Yes, sir.

Q. Did I understand you correctly, that you came to this meeting in April, 1949, at the request of Mr. Burnham?

A. I believe that is right.

Mr. Bird: That is all.

Mr. Worthwine: That is all.



ED RANDELL

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Your name is Edward Randell?

A. Yes, sir.

Q. Where do you live, Mr. Randell?

A. At Parma, Idaho.

Q. What is your business?           A. Farming.

Q. How long have you been farming?

A. All my life.

Q. How much land are you farming now?

A. I think 81 acres is irrigable, 25 acres that is considered as dry pasture.

Q. Is that the same farm that you were on in 1948?           A. That's right. [63]

Q. Were you present, strike that,—you are one of the Randell brothers who signed this contract with the Burnham's           A. That is correct.

Q. Were you present at the first meeting about May 11th, 1948, in Boise?

A. At Boise, yes, sir.

Q. When was the first meeting with the Burnhams,—was it here or at your ranch?

A. It was here at the Boise Hotel.

Q. You were here at the hotel with this group of other people who has been mentioned?

A. I was.

Q. How long did you spend in discussing the features of this contract?

(Testimony of Ed Randell.)

A. I don't recall how long, but I presume it was close to midnight when I left.

Q. Was your ranch discussed? A. Yes, sir.

Q. The program was that you were to give a mortgage to help secure the \$70,000.00 payment?

A. It was.

Q. And was the situation relative to your ranch talked about? A. It was.

Q. And what was that discussion? [64]

A. I told Mr. Skeen that there was a first lien of \$4,000.00 or some better against it. I recall that I gave him a statement from Denver stipulating what the lien was.

The Court: I have read the answer of the Defendants and it appears to the Court that you are assuming the burden of defending against the answer of the Defendants. I ruled as to the other witness that was on the stand that was immaterial until the Defendants put in their case. I simply mention this, it appears to me that you are presuming what their defense will be.

Mr. Bird: Very well, thank you, Your Honor.

Q. After this agreement was signed did you take any part in operating the Cove Ranch in 1948?

A. No, I was operating my farm at Parma; I did go to the ranch a time or two, but I didn't operate it.

Q. Who was operating the ranch in 1948?

A. That was my brother Carl.

Q. Were you there on a few occasions?

(Testimony of Ed Randell.)

A. On two occasions, if I recall.

Q. Did you take part in making the application for a loan to the Federal Land Bank?

A. I went to Jerome, yes.

Q. Did you have anything to do with selling the grain and cattle that were sold off the ranch?

A. I wasn't present at that time. [65]

Q. Were you present at the conference in August, 1948?

A. Yes, that was when the duplicate of the contract was made.

Q. The modification of the contract?

A. Yes, I was there.

Q. What was the reason for that modification?

A. My brother Carl had become defaulted in the first agreement, that he agreed to give a mortgage on his property and wasn't able to do it.

The Court: Isn't that all covered by the agreement?

Mr. Bird: Generally it is.

Q. Did you you make any arrangements to go ahead and take part in farming the place in 1949?

A. Yes, I leased my place at Parma and we were all packed up; we figured we would go up and help my brother Mike farm the place.

Q. What prevented you from doing that?

A. Principally the ill health of my mother, my brother Mike felt that she had to be taken care of and the conditions didn't look good,—like it would be hard for us, a hard task for us to accomplish.

(Testimony of Ed Randell.)

Q. Who called you to the meeting in April of 1949?

A. I think the Burnhams requested us to have a conference.

Q. Did they make any request to or upon you at that time for any substantial sums of money? [66]

A. As I recall the interest due in May was asked.

Mr. Worthwine: We object to that as a conclusion; he may state the substance of the conversation, what was said.

The Court: Yes, just state what was said.

Mr. Worthwine: And please identify which Burnham did the talking.

Q. What did Mr. Burnham or either of them say about this money, if you know which one said it, specify that?

A. As I recall, the interest was spoken of that would be due on May 12th; he asked if we thought we would be able to meet that with the overhead expenses to operate the ranch. Brother Mike said it looked like it would be a rather hard pull.

Q. Did they say anything about having a cash buyer for that place?

A. I don't recall any cash buyer, there was a deal pending if we failed, that was talked as though we were not going to be able to go ahead with the ranch.

Q. Did Mr. Burnham ask you to turn the ranch back? A. No, not that I recall.

Q. You did turn it back on that meeting?

A. We turned it back as has been said before.

(Testimony of Ed Randell.)

Q. That was a mutual agreement by you and your brothers and the Burnhams? [67]

Mr. Worthwine: The contract speaks for itself.

Mr. Bird: Very well, you may cross-examine.

Cross-Examination

By Mr. Worthwine:

Q. When was the first time you saw the Burnham brothers, or either of them?

A. The first that I met them was at the Boise Hotel on May the 12th, I think it was.

Q. You had never seen them before?

A. No, I hadn't.

Q. You didn't attend the meeting in Twin Falls in April where the two Burnhams, Mr. Skeen and Mr. Abegglen were present? A. I did not.

Q. And you didn't agree to the contract at that time for the purchase of the Cove Ranch in April?

A. I wasn't there.

Q. You were not there when Mr. Abegglen under the dictation of Mr. Skeen wrote the contract for the purchase of the ranch,—the Cove Ranch?

A. That was when?

Q. In April, 1948.

A. I wasn't present at the time, no, sir.

Q. What were you told by Mr. Burnham when he asked if you and [68] your brothers would be able to pay the installment of interest and operate the ranch, what was your answer to that?

A. I had no chance whatever to pay.



(Testimony of Ed Randell.)

Q. Could your brothers meet it, the other two that were interested?

A. It is possible that my brother Mike could.

Q. You heard him testify that he had illness in the family that prevented him from going there?

A. Yes, sir.

Q. Did you know of that illness?

A. Yes, sir, I did.

Q. That is one of the principal reasons that he wanted out of the contract?

A. That was the main reason that we didn't continue on.

Q. How much does it cost to operate that place during a year?

A. I wouldn't know,—I didn't operate it.

Q. You were in possession of it a part of the time, did you make any estimate in the spring of 1949 as to what it was going to cost,—how much for wages, for water charges and the last half of the 1948 taxes?

A. I don't recall going over it.

Q. Do you think it would run as much as \$25,000.00?

A. I don't recall what it would run. [69]

Q. You and your brothers concluded that you couldn't do anything about that ranch under the contract that you had?

A. We didn't think,—or that is, we did think it would be the logical thing to get a release.

Q. You wanted out from under your \$25,000.00 mortgage you and your wife signed?

(Testimony of Ed Randell.)

A. We were perfectly willing to release our equity in it.

Q. You say you were packed and ready to go up?

A. Yes, sir, we had rented the place and gave possession.

Q. What time of the year was that?

A. In April.

Q. Where did you move to when you gave up possession of your ranch?

A. We have two homes on the place; I retained one and we were living in that.

Q. Have you been living there since?

A. After we made the last agreement with Burnhams we went back.

Q. Did you take possession of the ranch back?

A. No, we couldn't, it is leased to the first of March.

Q. Is your brother Carl in the court room?

A. Yes, sir.

The Court: Did you approach the Burnhams or did the Burnhams approach you to do away with this contract?

A. As I recall the Burnhams suggested it might be the logical [70] thing to do.

The Court: Was that a visit from they to you or from you to them?

A. It was at the Perrine Hotel, I presume it was at the suggestion of both parties.

The Court: Did you call them or they call you?

(Testimony of Ed Randell.)

A. Well, arrangements were made to meet.

The court: Who made the arrangements?

A. Very often it was at the request of Mike Randell.

The Court: Well, did you call them at that time or did they call you?

A. I don't recall just that incident.

The Court: Were you in default on the contract at that time?      A. No.

Q. (By Mr. Worthwine): Who telephoned you to attend the conference in May, 1949?

A. If I recall I was down here on account of mother's ill health.

The Court: Did you hear your brother testify that Burnham called him and asked for this conference?

A. If I recall, that is correct.

The Court: That is all I have.

Mr. Worthwine: That is all. [71]

Mr. Bird: Nothing further.

### CARL RANDELL

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Bird:

Q. Where do you live, Mr. Randell?

A. At Kimberly.

Q. What is your business?      A. Farming.

Q. How long have you been farming?

(Testimony of Carl Randell.)

A. Practically all my life.

Q. How long have you farmed the ranch you are now on at Kimberly?      A. Last year.

Q. Where were you farming in 1948?

A. At the Cove Ranch.

Q. And prior to 1948?

A. At New Plymouth.

Q. How many acres in the ranch you had there?

A. Now?

Q. No, prior to 1948, at New Plymouth?

A. Seventy acres of farming ground.

Q. How much other than that?

A. 230 acres,—there was a pasture. [72]

Q. When did you acquire that ranch?

A. I believe in 1947 or '46.

Q. How did you acquire it?

A. On a contract.

Q. Payable on the installment plan?

A. That's right.

Q. Will you tell me whether you were at a meeting at the Boise Hotel that has been discussed here on the 11th and 12th of May?      A. Yes, sir.

Q. When did you first meet the Burnhams?

A. At Twin Falls.

Q. Was it previous to this time?

A. Yes, sir, previous to this.

Q. At this meeting or rather at these meetings, were all the terms of the contract discussed?

A. At the Twin Falls meeting that agreement was just kind of an agreement as to what could be done in regard to purchase of the place with the

(Testimony of Carl Randell.)

Burnhams; nothing signed that night,—I just happened in there; I took copies down and showed them to my other brothers.

Q. At these meetings, particularly this one at Boise, was the condition of your ranch discussed?

A. It was discussed with Mr. Abegglen at home and at Boise.

Q. And at this discussion were these other gentlemen present?      A. Yes. [73]

Q. What was the substance of the discussion?

A. It was brought up that I had very little in my ranch, but if I could sell it for \$40,000.00, having bought equipment and so on, I would like to pay off this indebtedness on this Kraft cows; it was mentioned that I didn't have as much in it as the other boys.

Q. Did you farm the Cove Ranch in 1948?

A. I put up the hay,—the rest was leased out to Mr. Stellmon and Mr. Kimbrough, they had all the grain.

Q. Did you operate the dairy?      A. Yes, sir.

Q. And what was done with the milk and dairy products?

A. A part applied on the indebtedness of the cows that were bought from the Kraft Cheese Company, the rest was labor and upkeep as we went along, as much as we could get.

Q. Who had signed this contract with the Kraft Cheese Company, the Burnhams or you?

A. Originally, Mr. Leighton, and then Mr. Burnham took it over.



(Testimony of Carl Randell.)

Q. Who is Mr. Leighton?

A. Cliff Leighton.

Q. What was his connection with the ranch?

A. Well, he must have owned it at one time.

Q. Was he on the ranch ahead of you?

A. Yes, sir. [74]

Q. In your deal did you take over this obligation with Kraft?           A. Yes, sir.

Q. Do you know how much was paid on this Kraft account during the time you were on the ranch?

A. Between \$1700.00 and \$1900.00, I haven't the exact figures but they are here somewhere.

Q. Were some of the cattle sold while you were there?           A. Yes, sir.

Q. What was done with the proceeds of those sales?           A. It was given to Mr. Burnham.

Q. Do you know how much that was?

A. No, sir, I don't.

Q. Did you discuss these sales from time to time with the Burnhams?

A. Yes, sir, I always had a written order from Burnham to sell or dispose of any animals.

Q. Handing you Exhibit No. 12, are you familiar with that?           A. Yes, sir.

Q. What is that?

A. That is a letter written for me to take down one Holstein bull; 16 steers and 6 cows and one grade Guernsey cow to the stock yard sale and have the check made to Perry Burnham and send it to Salt Lake City. [75]

(Testimony of Carl Randell.)

Mr. Bird: We offer this in evidence.

Mr. Worthwine: No objection.

The Court: It may be admitted.

Q. Were other letters written to you along that line?

A. Not that I recall. On the last disposal of the cattle I called Mr. Burnham from the ranch and had him call Mike to get his approval to sell the rest of the cattle.

Q. And now, Mr. Randell, did you do some improvement work on the ranch?

A. We improved the house.

Q. How did you improve it?

A. The porch along there we made it into two rooms; it was ready to fall down and we made two rooms with a bath, we didn't complete it, but we put on a roof, a roof of 20 year guaranteed roofing.

Q. Did you put any improvements in any of the other houses?

A. We put the plumbing out of the big house into the small house and papered that and cleaned them all up.

Q. Did you take place at the meeting in August, 1948?

A. I was there at the ranch, yes, sir.

Q. What was the occasion for that meeting?

A. Well, I had become defaulted in this way, on the contract, if I made a sale I would not have anything to give a mortgage on, and if I was to turn the proceeds, but I sold at such a sacrifice that I

(Testimony of Carl Randell.)

didn't have anything left, any equity, and by the time I paid for my equipment it [76] left us without anything and I couldn't give the mortgage.

Q. Did you buy some equipment?

A. Yes, I borrowed money and bought a Fox hay chopper and a tractor.

Q. With the proceeds of the ranch?

A. That is borrowed money.

Q. Your brothers mentioned a caterpillar?

A. That was mine.

Q. How much did the hay chopper cost?

A. \$4,200.00.

Q. And the caterpillar you had?

A. Yes, sir.

Q. Did you buy any other equipment?

A. I didn't buy any other, but the brothers had a John Deere plow that stayed there until April 14th after we signed this agreement.

Q. How long did you stay on the ranch in 1948?

A. Until December with the family, and then I was back and forth; we had a man there until the 22nd and then he blew up.

Q. What did you do with the stock?

A. We moved it down to Eden and my place, we had three or four cows.

Q. The snow gets pretty deep up there in the winter time?

A. Yes, sir. [77]

Q. Would the stock be better off lower down?

A. That's right.

Q. Were you present at the conference in Twin Falls the first of April?

A. A part of it.

(Testimony of Carl Randell.)

Q. The Burnhams and your brothers were also there? A. Yes, sir.

Q. Mr. Abegglen was there?

A. Yes, sir, at different occasions, once I remember him being there.

Q. Was anyone else there? A. Mr. Skeen.

The Court: I think we will recess at this time for fifteen minutes.

February 9th, 1950, 11:20 A.M.

Q. Now about the persons present at this conference on April 14th, if that was the date, 1948—do you remember seeing Mr. Baldwin there?

A. The last time, yes.

Q. Did you know his interest in the matter?

A. He had a buyer for the ranch.

Q. Did he say that he was a cash buyer?

A. Not to my knowledge.

Q. During that conference was any suggestion made about you gentlemen raising \$10,000.00? [78]

A. It was discussed or talked about if we could revamp the contract then it was talked if we could raise \$10,000.00—yes, it was talked about in the discussion.

Q. What was the decision on that?

A. We never came to anything on that.

Q. Do you know about the amount of grain sold on that ranch and credited on your contract in 1948?

A. Around \$12,000.00.

Q. Do you know approximately how much it was?

(Testimony of Carl Randell.)

A. Yes, it was around \$12,000.00.

Q. And the cattle, that was about how much?

A. I would say roughly around another \$12,000.00.

Q. And would that include the shipment made late in the year about December?

A. I never got a report on the last shipment.

Q. Who got that?

A. That check was mailed to Mr. Burnham at Salt Lake City, Utah.

Mr. Bird: That is all, you may inquire.

### Cross-Examination

By Mr. Worthwine:

Q. That grain was produced by the people who had part of the ranch rented?

A. Mr. Stellmon and Mr. Kimbrough. [79]

Q. You had nothing to do with its growing, threshing or sowing?

A. We had to see that they got water, to keep the stock out, it was our job to see that they were protected.

Q. In regard to this contract in 1949—I think it was mentioned before as 1948—at this conference in Twin Falls in 1949 you stated that \$10,000.00 was discussed?

A. We were talking about what could be done.

Q. How much money you could raise?

A. He wanted to know if we could raise \$10,000.00 and we could revamp the contract.



(Testimony of Carl Randell.)

Q. What was it to be used for?

A. I don't know.

Q. Who was it to be paid to?

A. Mr. Burnham.

Q. Did the Burnhams make a demand for \$10,000.00?

A. No, sir.

Q. He didn't say, "You have to pay \$10,000.00 or else"?

A. No, sir.

Q. That \$10,000.00 was discussed in connection with having the contract revamped?

A. That is right.

Q. When did you move to Kimberly?

A. The 10th of December.

Q. What year? [80]

A. 1948.

Q. Was it to a ranch?

A. Yes, sir.

Q. Did you have a lease on it?

A. Yes, sir.

Q. You entered into that lease before you moved on it?

A. Yes, sir, I have two boys 22 and 17 years old, they were to farm that ranch.

Q. How many acres in that ranch?

A. Just 80.

Q. What equipment did you move from the Cove Ranch to the Kimberly ranch?

A. My caterpillar and the hay chopper and disc.

Q. You took that equipment away that you placed on the ranch in 1948?

A. Yes, sir.

Q. Was any of the plumbing that was placed in the buildings at the Cove Ranch removed?

A. The sink was removed from the big building and put in the small building.

(Testimony of Carl Randell.)

Q. Was any taken away from the ranch?

A. My personal property.

Q. What was it?

A. A hotpoint sink, stove and tank.

Q. You took those out?? A. Yes, sir. [81]

Q. They were connected up?

A. I connected them myself.

Q. You had water in them?

A. Not in the fall, I unconnected them or left them unconnected.

Q. The August meeting was brought about because you refused to sign the mortgage?

A. Yes, sir.

Q. When did you acquire the New Plymouth place? A. In 1946 I think it was.

Q. In the spring of 1948, what crops were growing there? A. Sugar beets.

Q. How many acres? A. Forty.

Q. What other crops?

A. We had it ready for corn.

Q. Do you remember the occasion of Mr. Burnham going to your ranch in 1948?

A. Yes, sir.

Q. Did you show him the growing crops?

A. Yes, I wanted to show him how we were farming.

Q. All you had was a contract to buy?

A. Yes, sir.

Q. When you sold the contract—you never received any deed? [82] A. A quitclaim deed.

Q. Anything recorded to you? A. No, sir.

(Testimony of Carl Randell.)

Q. When you sold the ranch you gave a quit-claim deed?      A. Yes, sir.

Q. You received no deed yourself?

A. No, sir.

Mr. Worthwine: That is all.

### Redirect Examination

By Mr. Bird:

Q. When Mr. Burnham saw your beet crop and the other crops, did he make any remark about them?

A. He remarked how nice they were.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

### CLIFTON B. LEIGHTON

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Bird:

Q. Where do you live, Mr. Leighton?

A. Salt Lake City, Utah.

Q. Where were you living prior to 1948?

A. At the Cove Ranch in Blaine County.

Q. How long had you been on that ranch? [83]

A. Approximately 18 months.

Q. What was your interest in the ranch?

A. I had purchased it on a purchase contract.

Q. From whom?

A. The Chipman people at American Fort, Utah.

(Testimony of Clifton B. Leighton.)

Mr. Worthwine: We object to that as being entirely immaterial.

The Court: He has answered and it may stand.

Q. Did you have any phone conversation with Mr. Burnham about this ranch in 1948?

A. Yes, sir, I did.

Q. Concerning the sale of it?

A. Yes, sir.

Q. What was that?

Mr. Worthwine: We object to this as entirely incompetent, irrelevant and immaterial; it does not pertain to any issue in this case whatever.

The Court: Inasmuch as the court has control of the matter, I will let him answer.

Q. What time was this conversation?

A. As to the sale?

Q. The conversation with Mr. Burnham.

A. Pertaining to this sale?

Q. Yes. [84]

A. It was at the time they were at Twin Falls talking about the terms of this contract.

Q. What was the substance of this conversation?

A. He called me and told me that they could sell it and the terms they could sell it under and asked for my approval of the sale, which I gave.

Q. Did you later have any conversation with his attorney, Mr. Skeen?

A. Yes, sir, many times.

Q. About this ranch?                      A. Yes, sir.

Q. What was the substance of this conversation?

(Testimony of Clifton B. Leighton.)

Mr. Worthwine: Will you fix the time and place and what was said?

Q. First, when you had the one—strike that—the first one you had, Mr. Leighton, after the sale?

A. I talked to Mr. Skeen practically every day, not to exceed three days apart from then until I surrendered possession of the ranch to the Randell brothers.

Q. Did you ever talk about this contract with Randells being satisfactory or unsatisfactory?

A. Yes, sir, at the ranch at least three different times—I was concerned about these mortgages, if they were worth the money and if the title was good, the condition of that. He being my personal attorney at that time I requested him to make an investigation as to the title [85] and putting the mortgages of record so they were legal in their form.

Q. What did he say about that?

A. The day they came to the ranch to make this inventory I asked him at that time, I said: "Have you got this mortgage and have you got them all recorded, are they good so that I can turn this stuff to these people," and he said: "Yes, you can turn them over now, everything is in order."

Mr. Bird: That is all.

#### Cross-Examination

By Mr. Worthwine:

Q. How many tons of hay could be produced on that ranch?



(Testimony of Clifton B. Leighton.)

A. Well, we figured right at 2,000 tons.

Q. Did you ever discuss this deal with Mr. Abegglen?

A. Yes, sir, during the time and after.

Q. Did Mr. Abegglen tell you when he was to get each \$2,000.00 of the commission?

A. Yes.

Q. What did he say?

A. The understanding was—in several different conversations with Mr. Burnham and Mr. Skeen, in different conversations that was had——

Mr. Bird: We object to all this, the contract takes care of that.

The Court: The contract takes care [86] of nearly everything, but we have gone a long way here, I think he may answer.

A. Mr. Abegglen was to receive \$2,000.00 each time one of these mortgages was paid.

Q. Each time they received \$25,000.00?

A. Yes, sir.

Q. But not otherwise?                      A. Not otherwise.

Q. So the condition under which he was to get \$2,000.00 was the payment of \$25,000?

Mr. Bird: We object to that as calling for a conclusion.

The Court: Objection is sustained.

Mr. Worthwine: That is all.

## JACK LEIGHTON

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Bird:

Q. Will you state your name?

A. Jack B. Leighton.

Q. Where do you live?

A. Moore, Idaho.

Q. Where did you live in 1948?

A. At the Cove Ranch at Gannett, Idaho. [87]

Q. (By Mr. Bird): This instrument is marked as Defendants' Exhibit No. 9, it was not offered.

Mr. Worthwine: I will offer it.

The Court: It may be admitted.

Mr. Bird: That is all I called this witness for, so he may be excused if it is agreeable.

The Court: Do you have any examination?

Mr. Worthwine: Yes.

## Cross-Examination

By Mr. Worthwine:

Q. I notice in this exhibit——

The Court: Mr. Worthwine, I don't believe this witness testified to anything except to state his name, I guess there is nothing for you to cross-examine on.

Mr. Worthwine: Very well.

PERRY BURNHAM

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. You are one of the Defendants in this case?

A. Yes, sir.

Q. Were the proceeds from the sale of the grain from the Cove Ranch in 1948 transmitted to you? [88]

A. I received payment for all the grain.

Q. How much did you receive on account of the grain,—would the amount you gave when your deposition was taken be the correct amount?

A. I beg your pardon?

Q. Would the amount you gave several months ago when your deposition was taken be correct?

A. No, there is a little error in the net I received for the grain in 1928, it was \$11,774.11.

Q. You said 1928, I believe you must have meant 1948.

A. Yes, I beg your pardon.

Q. What amount was received from the cattle sold during that year?

A. The net receipts for the cattle was \$10,609.05.

Q. Did that take into consideration the shipment in December, 1948?

A. That was all the cattle that was sold with the exception,—yes, it was all the cattle or livestock that was sold.

Q. Mr. Burnham, let me ask you if you didn't give these answers in your deposition to the follow-

(Testimony of Perry Burnham.)

ing questions asked. "Q. Mr. Burnham, weren't about two truck loads of cattle taken to the market from this ranch in December, 1948, that are not reflected in the figures heretofore given, somewhere in the vicinity of \$3,000.00 worth?" and your answer was "In December?" "Q. About [89] December, it was the very latter part of the year?" and your answer, "Oh, that is right, there was a shipment of cows, 20 head, went to Twin Falls Stockgrowers." "Q. What date was that, what date were they taken, please?" And your answer: "They sold for \$3131.25." "Q. That was the net?" And your answer: "There was a little freight come off that; I will give you the net down below if you want it." Do you remember that?

A. I don't remember the exact figure but I have each shipment and the receipt of the people who sold it.

Q. Let me ask you if you didn't testify as follows: "Q. How much did they pay to you on account of the purchase price of the Cove Ranch?" And your answer: "They haven't paid anything but we sold some livestock and we sold some grain." "Q. And what did you receive from the livestock and the grain?" Answer: "From livestock the net receipts is \$10,740.07; from grain \$11,806.83." Now in addition to that——

A. ——There was a little error in the figuring.

Q. In addition to that didn't you testify that there was a December shipment of a little over \$3,000.00?

(Testimony of Perry Burnham.)

A. There were three shipments that amounted to more than \$3,000.00.

Q. What amounts were credited on the account of the Kraft Company?

A. How much did I pay Kraft? [90]

Q. How much was paid to the Kraft Company on the Kraft account from the proceeds of the ranch in 1948?

A. I don't know, I never figured it up.

Q. Calling your attention to Exhibit which has been marked as Plaintiff's Exhibit No. 13, does that refresh your recollection as to the amount?

A. It doesn't refresh my recollection at all, but I think Mr. Skeen has a paper that I received from Kraft with their report, but I don't remember what it is.

The Court: Can it be stipulated as to how much was paid on this account?

Mr. Worthwine: We will not object to exhibit 13 which relates to the Kraft account.

Mr. Bird: Can we consider it during the noon recess?

Mr. Worthwine: Yes, I will be glad to.

The Court: Then we will recess at this time, and we will convene at 1:30.

February 9, 1950, 1:30 P.M.

Mr. Bird: I asked counsel if we can agree that these are the correct amounts of grain and cattle sold.

Mr. Worthwine: Yes, we can agree to that.



(Testimony of Perry Burnham.)

Mr. Bird: These are, of course, in [91] addition to the taxes and water charges paid.

Mr. Worthwine: We can agree to those figures.

Mr. Bird: Then the Plaintiff rests.

### PERRY BURNHAM

being called as a witness by the Defendants, having heretofore been duly sworn, testifies as follows:

#### Direct Examination

By Mr. Worthwine:

Q. You live in Salt Lake City, Mr. Burnham?

A. Yes, sir.

Q. How old are you?                   A. Seventy-two.

Q. Where did you first meet Mr. Abegglen, the Plaintiff in this case?

A. I met him at Twin Falls, Idaho.

Q. He testified you called on him before that time at Hailey, what are the facts in regard to that?

A. I was driving the car, and Mr. Skeen and my brother was with me; we stopped in front of his office, and my brother and Mr. Skeen went into his office; I never met him, I never got out of the car.

Q. There is some testimony about a meeting at Twin Falls at which you and your brother and the Randells and Mr. Skeen and Mr. Abegglen attended, do you recall that? [92]                   A. Yes, sir.

Q. Which Randell was present at that time?

A. Rube Randell and Carl Randell.

Q. And Rube is which one?

A. He is the older brother.

(Testimony of Perry Burnham.)

Q. Was any agreement reached at that meeting?

A. No, sir.

Q. What resulted from that meeting, to refresh your memory, was someone to pay or put up \$25,000 cash?

A. We called at Cliff Leightons at the Cove Ranch in the forenoon of the same day and we drove to Abegglen's office and then down to Twin Falls; Mr. Leighton informed me that he had a prospective sale for the ranch at \$150,000 and would get a down payment of \$25,000.

Q. What happened at the meeting in Twin Falls?

A. Mr. Rube Randell said that he had changed his mind and would not make any payment and wasn't particularly interested.

Q. Did the meeting adjourn?

A. That's right.

Q. Was there any discussion at that time about taking mortgages?

A. There could not have been such a thing, there was only one man who represented any mortgage at all, or who could say anything about it.

Q. Handing you Plaintiff's Exhibit No. 2, an Agency Contract, [93] is that your signature on that instrument? A. I think it is.

Q. On the back side? A. Yes, sir.

Q. Where was that signed?

A. At Boise, Idaho.

Q. In both places? A. Yes, sir.

Q. Both parts of the instrument?

A. All the papers I signed was at Boise, Idaho.

(Testimony of Perry Burnham.)

Q. About the Twin Falls meeting, after that where did you next see the Randells and Mr. Abegglen?

A. We went home from Twin Falls.

Q. How did you happen to come back?

A. As I remember Mr. Jack Leighton called me by phone and advised that it was possible that the deal might be put over by the three younger Randell brothers.

Q. After that call what did you do?

A. I got a hold of Mr. Skeen and my brother and son Robert and we all came up.

Q. Where did you meet Mr. Abegglen?

A. In front of the post office at Eden, Idaho.

Q. At that time did you see any of the Randells?

A. Not right at that time, we drove from the post office over to Mike Randell's ranch and spent about 30 minutes or a little longer. [94]

Q. You looked over the ranch?

A. We looked over the ranch and in the meantime Mr. Abegglen had gotten on the phone and said we could have a meeting at Boise and he could have all the boys meet together at Boise.

Q. On that trip to the ranch did you have any discussion with Mr. Abegglen about the titles to the property?

A. Yes, when we arrived, or during the conversation at the Mike Randell ranch; inasmuch as Mike wasn't there I said to Abegglen, "What have you to offer us?" We were talking and I said: "What have you to offer us in lieu of a down payment of cash

(Testimony of Perry Burnham.)

that Rube Randell was going to put up?" And he said that the boys had plenty of security and that their ranches were worth from \$75,000 to \$90,000 in the clear.

Q. Did he tell you about mortgages at that time?

A. Not at that time, I don't think he ever mentioned any mortgages at any time.

Q. What did you do after you went to the Mike Randell ranch?

A. We went from there to Boise.

Q. Did you have a meeting here in Boise?

A. Yes, sir, we spent the night; we got there late in the afternoon and stayed over night, Mr. Jack Leighton, Mr. Abegglen, Earl Burnham and my son Robert went to visit the Carl Randell ranch and the Ed Randell ranch. Mr. Skeen stayed at the hotel. [95]

Q. Did you reach a conclusion at the meeting at the Boise Hotel, did you reach any agreement?

A. Yes, sir.

Q. And Mr. Skeen was to reduce that agreement to writing?

A. That's right.

Q. What was said about the title to the ranches in your presence by Mr. Abegglen at the Boise Hotel?

A. I don't just remember that.

Q. Did you hear Mr. Skeen ask him about the title?

A. Yes, sir, he asked if he could get the titles and stuff ready—talking about finishing up the papers and so forth. After the deal was consum-

(Testimony of Perry Burnham.)

mated Mr. Abegglen agreed to get all the necessary papers and forward them to Mr. Skeen so that the thing could be finished up.

Q. Did you hear Mr. Skeen ask Mr. Abegglen whether the Randells had clear title to the ranches?

Mr. Bird: We object to that as leading.

The Court: It is leading.

Q. Do you understand my question, Mr. Burnham—did you hear Mr. Skeen ask about the titles?

A. Yes, sir, if the titles were all right; Mr. Abegglen said they had from \$75,000 to \$90,000 in their property, in valuation, in the clear.

Q. Where did you go from that meeting—the next day? A. To Twin Falls. [96]

Q. The next day?

A. No, we first went to visit Mr. Carl Randell's ranch. Mr. Abegglen and Mr. Leighton could not get accommodations in Boise that night, and we were to meet them there, and he took us to the Carl Randell ranch.

Q. What kind of a ranch did Carl Randell have?

A. The land we saw was cultivated land and was a very fine piece of land and very well cropped. I never saw a finer patch of beets than I saw there.

Q. Did you know that he didn't have a deed to it? A. Certainly not.

Q. Had you relied on Mr. Abegglen's statement concerning the condition of his titles?

A. I relied on his statement or I would not have gone to look at the ranch.



(Testimony of Perry Burnham.)

Q. Regarding this commission agreement, would you have signed it with Mr. Abegglen if you had known the condition of the Carl Randell ranch?

A. No, I would not have considered anything.

Q. Then after the contract was signed, the buy and sell agreement was signed also at the Boise Hotel?

A. Which agreement?

Q. To sell the Cove Ranch, that was signed at the Boise Hotel?

A. That's right. [97]

Q. And you made a trip in August when the contract was modified?

A. Yes, sir.

Q. About the Cove Ranch?

A. Yes, sir.

Q. And that was a trip up to the Cove Ranch?

A. Yes, sir.

Q. Mr. Skeen was with you at that time?

A. Yes, sir.

Q. And at that time you took over the livestock?

A. That's right.

Q. In regard to the Kraft contract, what did you do when you sold the cows?

A. I purchased the Kraft equity in these cows that they had left with Mr. Leighton—fourteen hundred and some odd dollars—I had to do that before I could legally turn around and sell them.

Q. Did you hear what had happened to the ranch in the fall of 1948, about it being occupied or unoccupied?

A. Yes, sir.

Q. What did you find out?

A. I received a letter from Mr. Mike Randell about January 1st, 1949, that they had moved the re-

(Testimony of Perry Burnham.)

maining cattle to his ranch and were feeding them at Eden.

Q. What finally happened to them?

A. We turned them to the Randell boys. [98]

Q. And that was in the deal entered into in April?

A. Yes, sir.

Q. How many head did you have?

A. 31 or 32 head, 26 at Mike's ranch and then three cows and some small calves at Carl's ranch.

Q. Now, why was it that you came to Twin Falls in May, 1949—at whose request?

A. Mr. Baldwin's.

Q. What took place at Twin Falls—there has been some testimony about a conference between—when you were present, your brother, Mr. Skeen, the Randells and Mr. Abegglen in the spring of 1949 at the time the contract was surrendered, do you remember that conference?

A. I do.

Q. And what did you offer, did you make any offer to the Randells?

A. I told them that I would help them out financially if they would go back on the ranch.

Q. Did Mr. Abegglen attend that meeting?

A. He came after we had been in session for five or six hours, then he came, yes, sir.

Q. How long did he stay?

A. As I remember about two or three hours.

Q. Mr. Abegglen testified that you were demanding a payment of \$10,000 or else—will you state the facts?

A. That is false, absolutely. [99]

Q. What offer did you make to the Randells at that time?

(Testimony of Perry Burnham.)

A. I offered to finance them in case they could not meet the payment in the spring, if they would go back—I never told them to get off—I never did anything in any shape or form to get them off the ranch except by their own choice.

Q. What reason did they give for not going back on the ranch?

A. They couldn't meet the payment and they asked us to make them some offer to let them go.

Q. And that is the time you turned over some 35 or 37 head of cattle to them?

A. That's right.

Q. Did one of the Randells give his reason as some illness in his family, that he couldn't go on with it?

A. Mr. Mike Randell said that he had an invalid mother and that he could not leave her, which was the reason and Carl said he would not go back except on a lease—if we would lease him the ranch; Ed said that he didn't want to go back if he could get some release or make some settlement, and Oreal Randell said about the same thing.

Q. He is the one that you referred to as Mike?

A. Yes, sir.

Q. Was it at their request that you entered into this cancellation agreement in the spring of 1949? [100]

Mr. Bird: We object to that as leading.

The Court: Perhaps it is a little leading, but you may go ahead.

A. They came to us in the morning after an all

(Testimony of Perry Burnham.)

day's session the day before and that was into the middle of the night—they came about 9:00 o'clock in the morning and said they had decided to quit, and they wanted to be released.

Q. The brothers had a session, had they gone off somewhere and consulted together?

A. They went home I guess, it was sometime between midnight and nine o'clock the next morning that they had this consultation. They returned and told us they were ready to quit.

Q. Which ones did the talking?

A. All three of them.

Q. Tell us as near as you can remember what they said?

A. As I remember Ed was the first one and he said: "We have decided that we cannot go on, I don't have the means and Mike cannot go because mother is ill and we don't think Carl"—or he might have said Carl wants to be relieved of his mortgage and so forth.

Q. He mentioned a mortgage?

A. He did.

Q. He is the one that didn't give a mortgage?

Mr. Bird: We object to that as leading. [101]

Mr. Worthwine: Maybe it is.

Q. They came to you at about nine o'clock and you entered into this agreement terminating the old contract?

A. Yes, sir.

Mr. Worthwine: You may cross-examine.

(Testimony of Perry Burnham.)

Cross-Examination

By Mr. Bird:

Q. You mentioned about this conference in May of 1949, you had reference to April, 1949, did you not, you had no conference in May of 1949?

A. Oh, yes.

Q. In May?

A. Let me see—I was thinking of April, I don't think we had a conference in May, I don't remember that we did.

Q. At this meeting Mr. Baldwin whom you mentioned, who was he?

A. He was a real estate man in Twin Falls.

Q. And what was his interest?

A. He had a customer to pay \$100,000.00.

Q. And you wanted to get rid of the Randells?

A. No, there would be \$40,000.00 more out of the Randell boys.

Q. You had received a substantial amount of payments from the sale of the grain and cattle?

A. Yes, sir.

Q. What was it Mr. Abegglen said about the securities on the three ranches of the Randell brothers?

A. The first was when we arrived at Oreal Randell's ranch at [102] Eden; when he didn't have a meeting of the boys set we couldn't get at anything, and I said, "What have you got that we can get in lieu of the \$25,000.00. We are not interested in anything except a good clean cash deal," and he said:



(Testimony of Perry Burnham.)

“These boys have got property in the clear to at least \$75,000 to \$90,000.”

Q. As you said a moment ago he said he had security to the extent of \$75,000 to \$90,000?

A. Well either way, I don't know how you want to say it, their interest clean of debt was worth \$75,000 to \$90,000.

Q. Then you knew there was some debts?

A. He hadn't told me.

Q. Did you hear that at the Boise Hotel conference; did you hear Mike say that he owed four or five thousand dollars? A. I did.

Q. That was the conference at which this contract was signed in May, 1948?

A. That's right.

Q. Did you at that conference also hear Carl Randell say that he was purchasing his ranch on a contract and that he considered his equity at \$25,000?

A. I never heard anything about the indebtedness, I thought his ranch was in the clear.

Q. How was your hearing at that time?

A. I don't think it was as bad as it is now. [103]

Q. Did you,—or could you hear a normal conversation? A. I could.

Q. Then it is a good deal worse now?

A. It is a little worse.

Q. Did you hear the three Randell brothers say that he owed something to the Reclamation Service? A. Yes, sir.

Q. And he presented a slip to show his indebtedness? A. I didn't know that.

(Testimony of Perry Burnham.)

Q. You knew there was an indebtedness?

A. I didn't know, but I understood from Ed Randell that he had a little indebtedness—there was a little indebtedness against that, and he had a ready sale of the ranch at that time for \$35,000.00.

Q. You knew that two of these Randell ranches were not clear when you made the contract in May, 1948?

A. That is my understanding.

Q. You don't remember Carl saying that he was buying his ranch under a contract?

A. I didn't know any such thing.

Q. That statement could have been made and because of the defect in your hearing you would not have heard it?

A. No, not so close by, especially when I was really following along in the deal.

Q. How close were you sitting to these witnesses in this trial, the several Randells, when they were on the stand? [104]

A. I guess about 12 or 15 feet away.

Q. Did you hear all of their testimony?

A. I didn't hear any of yours.

Q. Did I give any testimony?

A. You did a lot of talking, sometimes a little fast and a little low, and I didn't get all of it.

Q. You testified that Mr. Skeen instructed Mr. Abegglen to get these papers prepared?

A. Yes, sir.

Q. And who was he the lawyer for?

A. For myself and the two Leighton boys.

Q. What was Mr. Leighton's interest in the deal?

(Testimony of Perry Burnham.)

Mr. Worthwine: We object to that as immaterial.

The Court: It has been brought out here that there was some interest in the Leightons, he may answer.

A. I and my brother owned the ranch and made a price to the Leighton boys, and they got this offer, it was at a certain price and it appealed to them,—they are the boys that worked up this deal.

Q. What was that price?

Mr. Worthwine: We object to that as immaterial.

The Court: He may answer. [105]

A. The sale price was to be \$140,000.00.

The Court: Now, I cannot see where it is material, but you may go ahead.

Q. Under this contract, the original sale contract, between you and the Randells, they agreed to furnish you with certain securities?

A. That's right.

Q. On their ranches? A. Yes, sir.

Q. Mr. Skeen was your attorney in handling that matter?

A. He was attorney for the Leighton boys and ourselves.

Q. Didn't you instruct your attorney to go ahead and complete this contract and see that it was carried out?

A. Well, we relied on his judgment.

Q. Didn't you rely on him to get these securities in order? A. Yes, sir.

Q. And he took steps to that end?

A. He asked Mr. Abegglen to get the abstracts

(Testimony of Perry Burnham.)

and necessary papers together and get them to him and he would close the deal.

Q. It was Mr. Skeen's duty rather than Abegglen's under your understanding of the arrangement then?

A. Yes, sir, I think so, I didn't depend on Mr. Abegglen.

Mr. Worthwine: We object to all this as incompetent, irrelevant and immaterial, and it is a conclusion on a matter of law. [106]

The Court: That is right.

Q. Did you hear Ed and Mike Randell testify that they had leased their places for the season of 1949 preparatory to going on to the Cove Ranch and farming?

A. Yes, sir, I heard Ed say that he had made arrangements for his boys to go ahead and run his ranch.

Q. His boys?

A. His boys, he said he made arrangements with the boys to run the ranch.

Q. Did you hear him testify about that this morning?      A. Yes, sir.

Q. What did you hear him testify this morning?

A. That he leased the ranch,—something of the sort.

Mr. Worthwine: I object to that, he cannot ask this witness what the other witness has testified.

A. Yes, I heard him say that he leased it.

Q. Did he lease it to the boys?

A. I didn't hear him say who it was to.

(Testimony of Perry Burnham.)

Q. You heard Mike say he leased his ranch in preparation to going on the Cove Ranch?

A. I didn't pay much attention to them so I cannot say what he testified to.

Q. Your first contact with Mr. Abegglen, I believe you said you drove to his office but that you didn't go into the office? [107]

A. That's right.

Q. Did you see him at that time?

A. I don't remember seeing him at all, if I saw him it was through the window in his office.

Q. But you did approach his office?

A. Yes, I was the driver of the car.

Q. Your brother went in the office?

A. Yes, sir, my brother Earl and Mr. Skeen.

Q. You had fairly close contact with him through your brother and Mr. Skeen?

A. Not close enough to talk to him.

Q. You are sure that both portions of this commission contract was signed in Boise?

A. There is some question in my mind on this,—if there isn't a little bit of something wrong with that contract.

Q. What do you think is wrong with it?

A. In the first place when we agreed on an amount that Mr. Abegglen was to receive, as I remember he took a piece of paper and whether it was this or not,—but he wrote it in longhand, that is the kind of a piece of paper that I signed.

Q. Is that not your signature?



(Testimony of Perry Burnham.)

A. That looks like my signature all right but I have from my memory what I think took place.

Q. Was both sides of that contract signed at the same conference [108] in Boise on May the 24th, 1948?

A. I cannot remember signing, but I am sure that I didn't sign any contract at any other place except in Boise.

Q. How long were you in Boise?

A. We got there late in the afternoon and was there until the second day after,—after we returned from looking at the ranches we stayed the second night and left the second day and came to Twin Falls, Idaho.

Q. And all the signing was done on this commission contract during this period?

A. At different talks, all of that time.

Q. And it was signed before you left Boise?

A. Yes, sir, it was before I left Boise.

Q. On the back of the commission agreement which is Exhibit No. 2, it is dated May the 15th,—I may have stated the wrong date before,—it is dated May 15th?

A. I cannot account for that,—I cannot account for the sheet that I am sure was in longhand and that is now in printing,—that is the matter I am hazy on.

Q. Calling your attention to Exhibit No. 3, the contract made between you and your brother and the Randells on May 11, 1948, that is the first contract for the sale of the ranch, and it is provided

(Testimony of Perry Burnham.)

in the original contract that the buyers agree to pay \$140,000.00, \$70,000.00 on [109] or before two years, and \$70,000.00 in six annual installments beginning on May the 15th, 1949, do you consider and understand that is the correct date?

A. According to that agreement.

Q. The first installment becoming due before the major payment of the \$50,000.00?

A. My understanding was that there was one installment.

Q. Due before the balance of the \$70,000.00?

A. That is as I remember, that is right, but I would have to check in there,—I am just a little hazy on that.

Q. Now on this paragraph that I show you, do you know whose handwriting that is, this short paragraph in writing in longhand?

A. Some of the letters look like some of mine, and some are absolutely not mine; I never made a "D" in my life that looks like that, I don't know whose it is.

Q. I am not intimating that it is yours, Mr. Burnham, you say that at this meeting in Twin Falls, Mr. Abegglen was there for several hours?

A. That is which meeting?

Q. This last meeting when you agreed to cancel the deal, how long was Mr. Abegglen there?

A. I don't know, he came after we had been in session with the Randell boys for several hours. He stayed in the room with us and overheard the talking,—he did some talking too and then he disap-

(Testimony of Perry Burnham.)

peared, I don't know whether [110] he stayed there or where he went.

Q. He wasn't in the meeting when you had the final agreement?      A. That I don't remember.

Mr. Bird: That is all.

### Redirect Examination

By Mr. Worthwine:

Q. When did you find out first in the spring of 1949 that Ed Randell and Mike Randell had leased their ranches?

A. Ed told me that at the meeting,—our meeting in trying to negotiate a deal,—I don't just recall Mike's statement but I still have a faint recollection that Mike had made an arrangement with the man that he had hired and was working with him on the ranch prior to that time.

Mr. Worthwine: I think that is all.

The Court: Did you say anything to Mr. Abegglen about his commission at the time he was present when you negotiated taking back the ranch?

A. Yes, sir.

Q. What did you say to him about it?

A. An argument came up instead of their paying \$150,000.00 for the ranch it was reduced to \$140,000.00, and my brother and I and Mr. Abegglen decided it was a pretty stiff commission, and we didn't think we would go through with the deal and pay that commission; he put the deal through and he agreed to cut \$1,000.00. [111]

(Testimony of Perry Burnham.)

The Court: When you took the ranch back, at the time you made the deal to have the ranch returned to you, when Mr. Abegglen was there, was anything said about his commission at that time?

A. I don't remember that there was.

The Court: He never said anything to you about that?

A. No, sir.

The Court: There wasn't any question of the commission raised at all?

A. No, sir, not that I know.

The Court: You didn't feel that it was necessary to have the commission settled at the time you settled the deal with the Randells?

A. That's right, I didn't think he had any commission coming, we were taking back our own property.

The Court: That is all I have.

Mr. Worthwine: Nothing further.

Mr. Bird: That is all.

### J. D. SKEEN

being called as a witness by the Defendants, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Worthwine:

Q. Are you a practicing attorney?

A. Yes, sir. [112]

Q. Where do you live?

A. Salt Lake City, Utah.

(Testimony of J. D. Skeen.)

Q. For the purpose of the record, you are the J. D. Skeen that signed the pleadings in this case?

A. Yes, sir.

Q. How long have you practiced law?

A. Since 1902.

Q. When did you first meet Mr. Abegglen, the Plaintiff in this action?

A. I think it was the latter part of April, 1948.

Q. That has been testified to by Mr. Burham as the time when he drove the car?

A. That is the occasion.

Q. When did you next see him?

A. I saw him the same evening, I talked with him briefly; we went to Twin Falls and I saw him the same evening at Rube Randell's place.

Q. Was he present at the conference in Twin Falls that evening?

A. Yes, sir, he was there.

Q. Who else was present?

A. The two Burnhams, Mr. Abegglen, Rube Randell, Carl Randell and his wife, and Mrs. Rube Randell and myself.

Q. What was the subject-matter that was discussed at that time?

A. Well, they discussed a proposed sale of the Cove Ranch to the Randell brothers. [113]

Q. Which ones of the Randell brothers?

A. I hadn't met Mike or Ed at that time; I didn't take any active part in what was said,—in their conversation,—they talked off in a little alcove of the residence. I visited mostly with the two ladies.



(Testimony of J. D. Skeen.)

Q. Did you start to draw an agreement?

A. Yes, sir, they came to the room,—

Q. —Whom do you mean?

A. Mr. Burnham and one of the Randells, they had come to some agreement as to the price. The Burnhams had agreed to reduce it to \$140,000.00 and Mr. Abegglen started to take the contract under my dictation; someone said that Rube refused to put up the \$25,000.00 and that ended the conference.

Q. Was anything said about taking any mortgages?

A. Nothing at all, other than the Cove Ranch.

Q. When did you next come to Idaho?

A. I came from Salt Lake City with the two Burnhams,—I think we left early on the morning of the 11th of May and we stopped at Eden and then came down to the Oreal Randell ranch and remained there for about an hour or an hour and a half I should judge.

Q. And then you came to Boise?

A. Yes, sir, we came to Boise.

Q. During the time you were at Boise did you ask Mr. Abegglen anything about the title? [114]

A. I don't know that I personally asked the direct question, but the discussion went on up in the room at the Boise Hotel. They arrived at the terms of the agreement and I was asked to reduce their agreement to writing, and in connection with it the matter of titles was talked of by the various people in the conversation.

Q. What did Mr. Abegglen say?

(Testimony of J. D. Skeen.)

A. Mr. Abegglen stated at different times that they had three ranches; I don't recall whether he said there were any encumbrances on any of them, but I learned that there was on Mike's a mortgage to the Federal Land Bank of Spokane and the title, so far as I knew or of anything said there, was clear in Carl Randell and Ed Randell.

Q. I didn't get the last part of that answer, Mr. Skeen?

A. So far as I knew from anything that was said there the title was clear in Carl Randell and Ed Randell, there was no mention of mortgages made with respect to either of those ranches.

Q. Did you have any knowledge gained from anyone or anywhere that the Carl Randell ranch was encumbered,—strike that, please, Mr. Reporter,—let me ask you this, did you have any knowledge at that time that had been gained from anyone or from any place that Carl Randell didn't have title to his ranch?

A. No, I didn't know. I didn't know it was being bought on a [115] contract until it was stated here yesterday.

Q. You did later make a search of the records and couldn't find anything on it?

A. On the morning of the 29th of June I made, or had a search of the records made, and reported to me, and then I learned that Carl Randell didn't have any property in his name on record.

Q. After the meeting in the Boise Hotel, what time did that meeting end?

(Testimony of J. D. Skeen.)

A. What time of day?

Q. Yes, the first meeting?

A. The first appointment was about 9:00 o'clock in the evening and it continued until 12:00 or 1:00 o'clock in the morning.

Q. Now go ahead and tell what happened?

A. At the conference in the evening the details of the contract were worked out; the three Randells were to give mortgages on the respective ranches, the one at New Plymouth, the one at Parma, and the Oreal place, to secure the notes to be given by each of them for \$25,000.00; the terms of payment were agreed upon and they requested me to draw a contract embodying the terms of the agreement in the morning. I proceeded to draw the contract and that was on the morning of the 11th or 12th, I think it was the [116] morning of the 12th.

Q. Did they return to execute it?

A. Yes, sir, the Burnhams and the Randells and the Randells' wives,—two of them returned about 2:00 o'clock in the afternoon on the 12th of May to the hotel and we had lunch and then went up to the room and I read the contract through very carefully, and then I explained every phase of it to them, particularly with respect to the mortgages that were to be given, and the fact that the contract was not to take effect until the mortgages were given. Questions were asked and we discussed the matter, after which they all signed the contract without much further discussion.

(Testimony of J. D. Skeen.)

Q. Counsel for the Plaintiff called the attention of Mr. Burnham regarding the first payment on that contract, can you turn to that paragraph?

A. Yes, sir.

Q. Concerning the payments to be made in 1949?

A. Yes, I have it here. The payments were to be made as follows: "The buyers are to secure payment of the \$70,000.00 payable on or before two years from date hereof with three,"—that is not the paragraph I had in mind, I am sorry. The payments were to be made in accordance with this paragraph: "The buyers agree to pay for said property the sum of \$140,000.00 as follows: [117] \$70,000.00 on or before two years from the date hereof, and \$70,000.00 in six equal annual installments beginning May 15, 1949."

Q. Counsel seemed to think there was something wrong, was that the agreement?

A. That was the agreement.

Q. And why was it that some annual payments were to be paid before the \$70,000.00, if there was?

A. The Randells proposed to sell their ranches and to make the payments,—Mike had an offer of \$35,000.00 and was holding for \$38,000.00. They proposed to sell and immediately make these payments.

Q. Well, Mr. Skeen, if you had known or had any knowledge that Carl Randell didn't have title to his property would you have advised the Burnhams not to deal with them?



(Testimony of J. D. Skeen.)

Mr. Bird: We object to that as incompetent, irrelevant and immaterial.

The Court: I think it is immaterial but I will permit him to answer. It seems to me this later agreement takes care of this, but he may answer now.

A. No, I would not, and I would not have drawn any agreement or contract.

Q. Would you have advised them to enter into a commission agreement?

A. No, I would not, because I would have advised them no contract [118] could be made such as this.

Q. Where did you first see that commission agreement that is in evidence here?

A. It was presented to me right after or at the time, almost simultaneously with this contract of sale.

Q. Was it at Twin Falls?

A. No,—I saw no commission agreement except the one signed by C. B. Leighton at Hailey, but none signed by the Burnhams.

Q. Referring to the Boise meeting, after the contract was signed, what did you do, if anything, in regard to having the mortgages executed?

A. I immediately upon the signing, I addressed myself to Mr. Abegglen and said: "You can get the description of this property, get the titles run down, the land deeded to the different Randells and send it to me in Salt Lake City, I am leaving and will be in my office at noon, and I can get these made the following day." He said: "Why don't you get



(Testimony of J. D. Skeen.)

the description and do it now," and I said: "No, you can get the descriptions,—you would not be entitled to a contract until you get the mortgages signed." And he indicated that he would do that, and we left after that discussion as to how the descriptions would be gotten to me and the mortgages made. [119]

Q. You never did get the description of the Carl Randell place?

A. No, sir, Mike Randell had the tax receipt with the description on his property, and sometime later Ed Randell sent down the deed to his property, but Carl Randell sent nothing, and shortly after that within a course of a few days I started to communicate with him and I called him by telephone, and I came up and Carl was there in the small house. I don't know whether he had moved in, his wife was there and I presented him with the mortgage and the note, and he and his wife signed the note, and he didn't have the description of the land but he signed the note and promised to complete the mortgage and send it to me in a few days. He failed to do so; I never got any mortgage from him, and on the 28th of June I came up to find out what could be done to straighten it out, and then for the first time I found that Carl had no title to any land in New Plymouth or any other place that I could find.

Q. Do you recall a meeting in Twin Falls in April, 1949?      A. Very distinctly, yes, sir.

Q. Where did that meeting take place?

(Testimony of J. D. Skeen.)

A. In the Park Hotel.

Q. And who was present? [120]

A. Perry Burnham and Earl Burnham, Robert Burnham a part of the time, and the three Randells, Ed, Mike and Carl and the wives of Ed and Carl at least on the second day; I don't know that they were there on the first day, and Mr. Abegglen was there for an hour or so on the evening of Saturday, that was the 3rd of April; then the three Randells that I have named and the wives of the two that I mentioned were there Sunday morning.

Q. And were you present at a conversation there, if so, what was said by the Burnhams to the Randells?

A. Of course, the conversation lasted a good many hours; the substance of the conversation between Perry Burnham and the Randells, Ed and Mike, was that he was desirous of having them go back on the ranch and continue with their contract; that he would help them in stocking up the ranch and working it out if they two would cooperate and go on the ranch and take care of it.

Q. Did either of the Burnhams say anything about advancing money?

A. Yes, sir, Perry said he would advance money to help them out.

Q. Mr. Abegglen testified that the Burnhams were demanding or requiring a payment of \$10,000.00 there,—did you hear any demand for \$10,000.00 cash?

A. There was no such statement made by Mr.

(Testimony of J. D. Skeen.)

Burnham, I am sure that it was not. I do know about a \$10,000.00 and it is [121] the \$10,000.00 that Mr. Abegglen had in mind I am sure, but it was not a payment of \$10,000.00. It was an application for a loan on the ranch that was pending. A conference was had with Mr. Heise and two of the appraisers of the Prudential Life Insurance Company with respect to the loan,—a loan to the Randells on the property, and the loan it seemed after the property was appraised was approved as to the value of the property, but the question was raised as to them having a sufficient interest in the property to justify the loan. Mr. Ed and Mr. Mike Randell were trying to figure out a way to increase their equity in the property so that the loan could go through. In connection with this Ed proposed the selling of his farm for \$15,000.00, paying his mortgage and paying the real estate commission that he had there of some \$15,000.00, and there would be about \$6,000.00, approximately \$6,000.00 out of which the real estate dealers could be paid in cash and a mortgage could be carried on the balance, and he asked me to take it up with Mr. Burnham and Mr. Burnham said that he would release the mortgage and take a contract of sale to Ed's ranch to help them work it out, and I think that is the \$10,000.00 that was referred to by Mr. Abegglen. [122]

Q. How did you know,—strike that, please,—how did Mr. Burnham come to go to Twin Falls in April, 1949?

A. Yes, I know, Mr. Mike Randell talked to me

(Testimony of J. D. Skeen.)

over the telephone and my recollection is that he called me at my office at about 11:00 o'clock one day and he said that he was having a rather serious time at home and that they could not go on before communicating with Mr. Burnham,—that was the beginning of the trip up here to work up some kind of a settlement with them. I don't remember whether I came up with them the first trip or the second trip, at which the meeting was at the Park Hotel in Twin Falls.

The Court: We will recess at this time for 15 minutes.

February 9, 1950, 3:00 o'Clock P.M.

Q. Referring to the meeting in August 1948 at which time the contract was modified, did you at that conference,—that was at the Cove Ranch I believe?      A. Yes, sir.

Q. Did Mr. Abegglen come to that meeting?

A. It was not exactly a meeting, the Burnhams were there and the Randells and we just talked around at different places on the ranch there; Mr. Abegglen was there for a short time.

Q. One of the witnesses testified,—I believe it was Mr. [123] Cliff Leighton that testified after the meeting in 1948 in Twin Falls you telephoned him?

A. If you have reference to the statement made that the mortgages were taken and were good and for him to surrender possession, yes, I heard that.

Q. Did you put in such a call to Cliff Leighton at that time?



(Testimony of J. D. Skeen.)

A. No, I didn't say that the mortgages were taken, I didn't tell anyone that because they were not taken,—one was not taken.

Q. Was the mortgage or mortgages discussed?

A. I told him about the mortgages and that they would be good when we took them but we didn't have one of them.

Q. At the Twin Falls meeting,—first, when this meeting was had Rube Randell was present?

A. Yes.

Q. And no mortgages were mentioned at all there.

Q. Immediately following that meeting did you call Mr. Cliff Leighton and talk about mortgages?

A. No, I don't think so; I had no conversation with respect to mortgages at that meeting, but after the one here in Boise, I talked about the mortgages, we were talking with him.

Q. Did you have a discussion at the April meeting with Mr. Abegglen in 1949? [124]

A. I did.

Q. Tell us what that was.

A. Well, he came up to me in the upper balcony in the Park Hotel and he said that the Burnhams were not treating the Randells right; they had no business calling on them to pay \$10,000.00, and I said: "They are not calling on them to pay \$10,000.00, they are trying to get them to go back on the place." And he said that they demanded too much, and I said they were compelled to do something, and they came down to work out some kind of a



(Testimony of J. D. Skeen.)

settlement and we would like his cooperation; that he had got us into it and we had to clean it up and we wanted his cooperation, and he refused to participate in any sense to help us and he left.

Q. Was there anything said about the commission?

A. I tried to talk to him about the commission but he wouldn't talk; all he would say was that a contract is a contract; that is all he would say.

Mr. Worthwine: You may examine.

#### Cross-Examination

By Mr. Bird:

Q. Mr. Abegglen refused to participate in that conversation of April the 4th.

A. Yes, sir, he refused to participate or discuss it.

Q. Did you hear Mr. Burnham testify that he sat there for two or three hours in that [125] conference?

A. Will you repeat that question?

Q. Did you hear Mr. Burnham testify that he was at the conference for two or three hours?

A. I understood Mr. Burnham to say that he was around there for two or three hours,—there was no conference, they were just assembled there in a conversation.

Q. Mr. Abegglen was just in the hotel, he had not and did not participate in that meeting?

A. He came around the hotel and sat around for

(Testimony of J. D. Skeen.)

sometime; I wouldn't say for two or three hours. I tried to talk to him but I wasn't able to though, I don't think he participated in that conversation.

Q. Did he participate other than in his talk with you?

A. I don't know whether he talked with Burnham or not; they were down the balcony there and I know we didn't sit around a table and have any discussion.

Q. Did you accompany Mr. Burnham to Hailey?

A. I was there with the Burnham brothers.

Q. They drove to Abegglen's office?

A. Yes, sir.

Q. Did you get out of the car?

A. I went in and had a talk with Mr. Abegglen.

Q. Did Mr. Burnham get out?

A. I don't think that Perry got out, he had a little difficulty in getting around,—I think Earl got out and was standing [126] around during the conversation with Mr. Abegglen.

Q. Did Mr. Abegglen come out when you departed?

A. I don't think so, I asked him to let me see the Leighton listing of the property and he let me look at it.

Q. I understand you to say in the early part of your testimony that you didn't know that Mr. Carl Randell only had a contract on his farm until this matter came up in this court room?

A. That is true, I never heard it from anybody: I talked with Carl, Mr. Abegglen and with Mike,

(Testimony of J. D. Skeen.)

and in the discussion in the Boise Hotel no one ever suggested for a moment that Carl's interest rested upon a contract. On the contrary, they did state that it rested upon a deed, and I drew the mortgage on deeded property.

Q. You didn't know that about Carl's ranch until this trial?

A. I suspected it, but I never knew,—I drove down to Parma and tried to find out where Carl's place was and I called the abstract company and had a report that,—

Q. You are the J. D. Skeen whose name appears as attorney in the answer to the amended complaint?

A. In the answer, yes, I am.

Q. Let me read from this page 5,—paragraph Two beginning on the sixth line: "The Plaintiff and the said Randells failed and neglected to furnish the said record, and thereafter, on or about the 30th of June, 1948, Defendants [127] procured such records, and then found that the said Carl Randell was not the owner of the farm exhibited to the Defendants, or any farm whatever."

A. I just said that I went down and found there was no farm in Carl Randell's name in New Plymouth that I could find.

Q. Then you knew it before you came to this trial?

A. I didn't know then that it rested upon a contract, I saw that the legal title, so far as the abstract reported, was not in Carl Randell's name, and I

(Testimony of J. D. Skeen.)

could find no property in his name; as to how he was in possession as a tenant or a contract purchaser, I didn't know until yesterday.

Q. Were you familiar with the dealings being had at the time they applied for a loan,—at the time the Randell's applied for a loan?

A. You mean familiar with their property?

Q. The application for a loan?

A. I never saw the application.

Q. Do you know why they didn't get the loan?

A. I only know that I attended a conference in Mr. Heise's office in Jerome with Mr. Heise and the appraisers, and the reason that they couldn't make the loan was that the Randells' equity in the property was not [128] sufficient for them to accept the loan,——

Q. ——Did they say anything about so much litigation involving the Cove Ranch?

A. I didn't hear that question, Mr. Bird.

Q. Was the complaint made in connection with the application for the loan on the ground that litigation was pending involving the Cove Ranch?

A. I don't recall any specific reference to that in the conversation, but I called their attention to the fact that Stewart had a contract of sale to Leighton, and there was a suit pending, and I said that Mr. Burnham would put up a bond to protect the title,—it was mentioned.

Q. With reference to the conference in Boise was Leighton present?

A. In reference to the conference where?

(Testimony of J. D. Skeen.)

Q. In Boise.

A. Jack Leighton was there, C. B. Leighton was not.

Q. Mr. Abegglen was supposed to get these descriptions and the abstracts and send them to you?

A. There was a perfect understanding of that.

Q. Did you get the abstract on the property?

A. Not until the 29th of June. [129]

Q. Did Mr. Abegglen send you those?

A. He sent me nothing, we got the tax notice from Mike containing the description of his; I got the deed from Ed to Ed Randell's property from which I made the mortgage.

Q. Had these Randell boys been requested to send these instruments to you?

A. Only in this way, that I wrote the contract, and when I said we must have this title run from the last conveyance to the Randells immediately because the contract could not be put into effect until I had the mortgages.

Q. Then the Randells were requested to furnish them?

A. No, I said to the group of them: "Perhaps you boys are not familiar with the record, and Mr. Abegglen is, he can get this and send it to me at once." That is the understanding we had when I left.

The Court: How did you get the description to fill in?

A. The description of Mike Randell's from the tax receipt that he sent, and the description to Ed Randell's from two deeds that he sent to me later,



(Testimony of J. D. Skeen.)

and I never got the description of the land that Carl Randell was on.

Q. At the conference on April 4th, 1949, in Twin Falls, who else was there besides the Burnhams and the Randells, [130] yourself and Mr. Abegglen?

A. I presume you have reference to Mr. Baldwin, I saw him, that was the first time I ever met him. He was there a few minutes and left, and then I saw him again on Sunday about noon, the second day we were there. He and the ones I mentioned are all that I recall being there at any time that had anything to do with this. Later on Sunday Mr. Baird, a prospective purchaser, after the Randell settlement was made, and his son-in-law, Mr. Bartlett and Mrs. Bartlett came to the hotel and we talked to them.

Q. You talked to these other gentlemen about a sale of the ranch when the Randells could be gotten off?

A. I talked to Mr. Baird and Bartlett and I dictated a tentative contract to Mr. Baird's daughter in the morning. I talked to Mr. Baldwin a few words over the phone, although he came down on Sunday.

Q. Burnhams had a live prospect if and when they got rid of Randells?

A. That is kind of a restricted term—there was a chance to sell the property—there was a chance to sell it to Baird and Bartlett, it was off and on. I contract of sale was made the following Monday.

Q. Did that contract call for a substantial amount of cash? [131]

(Testimony of J. D. Skeen.)

A. I think my memory is good on that, it called for a cash payment of \$5,000.00, \$10,000.00 in ninety days, a substantial payment in December; the consideration was \$100,000.00.

Q. Were those gentlemen, Baird and Baldwin, there before the signing of the contract with Randells?

A. Baldwin was there for a moment on Saturday morning.

Q. What day of the month was that?

A. That was the 2nd of April. He left—he phoned me personally while we were eating breakfast the following morning about 9:00 or 9:30 and wanted to know if they had made settlement with the Randells and if it was all off. I told him that the settlement had not been made, but that the Randells had reported that they could not go on, and he said that if there was a chance to buy the ranch they would drive down.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

The Court: Where are those two \$25,000.00 mortgages now.

A. The mortgages are here in court.

The Court: In whose possession?

A. They have been in my possession, I brought them into Court.

The Court: They are in your possession for your clients?

A. I think I am their lawyer. It was provided

(Testimony of J. D. Skeen.)

that Randells [132] should take the cattle for \$6,000.00 interest on or before April 1st, at which time the mortgage would be cancelled of record.

The Court: Do you have any way to determine the value of those two \$25,000 mortgages?

A. Yes sir, indirectly, Mr. Randell—Ed Randell had his property appraised, so he reported to me, at \$15,000.00 subject to a mortgage for \$4,000.00 or a little over.

The Court: And the other one?

A. I don't know, I have always refrained from putting a valuation on that.

The Court: That is all I have.

### ROBERT BURNHAM

being called as a witness by the defendants, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Worthwine:

Q. You are Robert Burnham?

A. Yes, sir.

Q. Where do you live?

A. Salt Lake City, Utah.

Q. You are the son of one of the Defendants?

A. Yes, sir, Perry Burnham.

Q. When did you first meet Mr. Abegglen? [133]

A. As I recall it was the 11th day of May, 1948, in front of the Eden post office.

(Testimony of Robert Burnham.)

Q. Did you accompany your father and your uncle and Mr. Abegglen to the Randell ranch at Eden?      A. Yes, sir.

Q. Did you hear Mr. Abegglen make any statement at that time concerning the ranches that were being proposed as security, did he make any statement as to the value and condition of the title?

A. Yes, sir.

Q. Where and who was present?

A. After we were there a short period of time and it wasn't made absolutely clear what Randell had to offer, my father grew impatient and went to his car and he said: "If they don't have something in the nature of a clear title, we just as well go home."

Q. To whom did he say that?

A. Mr. Abegglen.

Q. What did he say?

A. He came over to the car and said: "These men do have a clear title in the ranch from \$75,000 to \$90,000."

Q. Did he say anything about the title?

A. Those are the words that I remember.

Q. Did you accompany your father and your uncle to Boise at that time?      A. Yes, sir. [134]

Q. Were you present at the meeting in the Boise Hotel?      A. Yes, sir.

Q. And Mr. Abegglen was present.

A. That is correct.

Q. What happened, what conversation or state-

(Testimony of Robert Burnham.)

ment did you hear Mr. Abegglen make concerning the property of the Randells?

A. As I recall at that meeting in the presence of the Randell brothers and the two Mrs. Randells, and the others, in answer to Mr. Skeen, he said that they did have this clear title interest from \$75,000 to \$90,000, that is my memory.

Q. Did you accompany any one the next day to visit certain ranches?           A. Yes, sir.

Q. With whom did you go?

A. My father and my uncle.

Q. Where did you go?

A. We went to New Plymouth where we were to meet Mr. Abegglen and Jack Leighton.

Q. And were you shown a ranch?

A. Following our meeting at New Plymouth we drove out to Carl Randell's ranch in a northeasterly direction from town across a creek.

Q. Was it called the Carl Randell ranch? [135]

A. Mr. Abegglen said this is Carl's ranch, and when we were walking out to the beet patch, I asked Mr. Abegglen: "Is this Carl's ranch?" And he said: "Yes." I said: "Has he good title to it?" and he said: "Yes."

Q. Were you present at the time the August agreement was entered into at the Cove Ranch?

A. I was in and around there, there were several discussions around the property.

Q. Did you see Mr. Abegglen?

A. My memory says that he drove up there.



(Testimony of Robert Burnham.)

Q. Do you recall anything that Mr. Abegglen said?

A. As I recall he came out, and his attitude seemed to be that he was slightly upset to be requested to come up there—in substance he said he was upset, and he didn't like to come out and waste his time and gas, and that he didn't have any interest there, and shortly he turned around and left and I suppose he went back home.

Q. Did you make a visit to the Mike Randell ranch in Eden in 1949?           A. Yes, sir.

Q. What was the purpose of that visit?

A. As I recall the purpose of that was that there had been a previous communication between Mike and my father, one of which was a letter where he stated the amount of cattle that he had there. [136]

Mr. Bird: Do you have the letter?

A. I don't have it.

Mr. Bird: We object to this, the letter would be the best evidence.

The Court: Yes, that is true.

Q. That was from Mike Randell?

A. Yes, sir.

Q. Whose cattle were they?

A. My father's.

Q. Who did you see on this trip, what ones of the Randell brothers?

A. The ones I remember at that meeting in March was my father and Mike and I. Jack Randell was there too as I recall.

(Testimony of Robert Burnham.)

Q. Was anything said on that occasion about the Randells leaving the ranch or surrendering the contract?

A. As a matter of fact it was stated to my memory.

Q. By whom?

A. Obviously it must have been Mike Randell, he is the one that stands out in my memory—they anticipated there would be some difficulty in carrying out the terms of the contract and they wished us to consider releasing them under those terms.

Q. What did your father tell Mr. Mike Randell when he made the [137] suggestion that they might have difficulty?

A. It caused considerable apprehension.

Mr. Bird: We object to that as a voluntary statement.

The Court: Yes, it may be stricken, you may state just what was said.

Q. What did your father say?

A. He encouraged them all that he could.

Mr. Bird: I move to strike that as not responsive and being a conclusion of the witness.

The Court: It may be stricken.

Q. What did your father say?

A. The exact word? No, I cannot give them.

Q. The substance?

A. In substance he said: "We would like you to go ahead with the contract."

Q. You knew at that time, or was there anything

(Testimony of Robert Burnham.)

said at that time about anybody being on the Cove Ranch?

A. There was, and my knowledge is no one was on there.

Q. You were not present at the meeting in April, 1949?

A. I was there in person but I don't suppose I took part in any of the conversation or conference.

Q. Did you hear anything said by your father or uncle, that they had to dig up \$10,000.00? [138]

A. I don't recall that.

Q. Was your father the spokesman or did your uncle take part in that?

A. I think both took part—I know of one instance they were sitting on the mezzanine floor on a three-cushion affair, Mike Randell was on one side and Ed Randell on the other, and they were there over an hour and I know Dad encouraged them to go ahead.

Q. Do you recall the substance of what he said?

A. Yes, he said, "We would much prefer your going ahead rather than giving it up."

Q. Did you hear anything said about advancing money, did you hear any such statement?

A. Hazily I do remember it, yes, sir.

Q. What was it your father said at that time, if it was your father?

A. My father at one time said that if they had difficulty in going ahead with the contract that he would advance them some money, I remember particularly for livestock.

(Testimony of Robert Burnham.)

Q. Do you recall the substance of what Mr. Randell said as to why they didn't want to go on?

A. The following morning they came, Ed and Mike—Mike appeared first and he said they had talked it over after they left the meeting—I suppose early in the morning [139] or before they got there—that was about 9:00 o'clock; that they decided not to go ahead with the contract and wished to be released.

Q. Did you visit the Cove Ranch later that spring?      A. In 1949?

Q. Yes.      A. Yes, sir.

Q. What time of the year was that?

A. As I recall it was some few days later, within a week, as a matter of fact, it was right after this meeting.

Q. What did you notice about the condition of the buildings, and equipment and the property?

A. The sheds had been caved in, the dairy barn had been caved in.

Q. What was the cause of that?

A. I suppose it was the weight of the snow, that was told to me.

Q. Did you notice any of the equipment?

A. One of the sheds where the roof had caved in was where one of the tractors was.

Q. Did you observe anything else?

A. Yes, we went into the house and I noticed most of the wiring that was visible was torn out of

(Testimony of Robert Burnham.)

the house, and where the plumbing had gone into the kitchen, a short piece of pipe was attached to it and run outside, and [140] the water was allowed to run, and in that way the house wasn't very clean—the doors were open, they were shut but they were not locked.

Q. Where was the hay chopper and the other equipment, the tractors—I believe you said one was in the shed?      A. Yes, sir.

Q. Had the equipment been gathered up and placed in the sheds?

A. Some of it and some had not—there were two groups of machinery.

Q. All right, go ahead and tell us.

A. The hay chopper was down at his place, it belonged to Carl Randell, and the tractor was an Allis-Chalmers, that was included in the inventory.

Q. And where was that?

A. That was in the shed that had fallen down.

Q. There was a caterpillar?

A. No, that belonged to the Randells.

Q. And a tractor?      A. Yes.

Q. Where was that?

A. That was outside.

Mr. Worthwine: I think you may inquire.

#### Cross-Examination

By Mr. Bird:

Q. The winter of 1948-1949 was a phenomenally severe one? [141]

A. In some localities.



(Testimony of Robert Burnham.)

Q. At the Cove Ranch?

A. I understand their water supply was one of the dryest.

Q. The severeness of the winter, not the water supply?

A. I was never there except in the spring, I don't know.

Q. You were at the conference in the Boise Hotel in 1948, on May the 11th and 12th?

A. Yes, sir.

Q. Did you hear most of the talk that was going on?      A. I think I heard most of it.

Q. Did you see one of the Randells, Ed, I think, present to the group a slip of paper from the Reclamation Service showing the status of his obligation to that Department?

A. That is not in my memory.

Q. I suppose that you didn't hear Mike say that there was a \$4,000.00 loan on his property?

A. That was brought to my attention at that meeting.

Q. Did you hear him make that statement at that meeting?      A. Yes, sir.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

## EARL BURNHAM

being called as a witness by the Defendants, after being first duly sworn, testifies as follows: [142]

## Direct Examination

By Mr. Worthwine:

Q. Will you state your name?

A. L. Earl Burnham.

Q. You are one of the Defendants in this action?

A. Yes, sir.

Q. Where do you live?

A. Bountiful, Utah.

Q. Your occupation or profession?

A. At the present time I haven't any in particular.

Q. Handing you Defendants' Exhibit No. 16, will you state what that is?

A. That is a check made out by myself to Jack Leighton.

Q. Are you familiar with Mr. Abegglen's signature? A. Well, no, I am not.

Q. Do you know why you drew that check?

A. Yes, sir, my brother got notice through Jack Leighton that there was a bill of \$500.00 due on a watering box or weir to the Irrigation Company that sends the water to the Cove Ranch.

Mr. Worthwine: We offer in evidence Exhibit No. 16.

Mr. Bird: The only objection we have is that it has no bearing on this matter whatever.

The Court: I will admit it subject to the objec-

(Testimony of Earl Burnham.)

tion and give it such weight as it is entitled to. [143]

Mr. Worthwine: This is a check for \$400.00 to Jack Leighton, endorsed by Jack Leighton, and Harold Abegglen.

Q. Mr. Burnham, you met Mr. Abegglen at Hailey in his office as has been testified to here?

A. Yes, sir.

Q. Where did you go from Hailey on that trip?

A. We went down to Rube Randell's home.

Q. Who was present at that meeting at Rube Randell's home?

A. Rube Randell, his wife, Mr. Skeen, myself and Mr. Abegglen.

Q. At that meeting what was the subject matter of the discussion?

A. Well, we discussed the possibility of a sale of the Cove Ranch.

Q. Was any agreement reached at that meeting?

A. No, sir.

Q. When next did you meet Mr. Abegglen?

A. At Eden.

Q. What time of the year was that?

A. That would be along in August—that was in May, 1948.

Q. Did you hear the question of the title discussed by Mr. Abegglen or in his presence?

A. I did at Mike Randell's ranch.

Q. Will you state the substance of the conversation? [144]

A. My brother Perry asked him what the Randells had in the way of security, I believe—I am

(Testimony of Earl Burnham.)

not too familiar really with all that went on but he did say that they had property of the value of from \$75,000.00 to \$90,000.00.

Q. Was anything said about the title as you recall? A. No, not that I recall.

Q. And then you attended a meeting in the Hotel Boise that evening? A. Yes, sir.

Q. Was anything said at that time about the title?

A. I don't know just what was said, but I have it in my mind that there was a mortgage on the Mike Randell farm, and on that day or the evening before we went to look at those farms that was mentioned.

Q. That was the day you went to Mike Randells—I am asking about the conversation in the Boise Hotel?

A. Yes, should I go ahead and tell the conversation?

Q. Yes, the best you can.

A. After we came back from the Carl Randell farm and Mike Randell's farm I mentioned the fact to Mr. Abegglen that it was a wonderfully fine farm of Carl's. He said: "Well, he has a standing offer of \$40,000.00 for it," and I said: "Why doesn't he sell it?" and he said: "Well, he thinks if he kept it and developed the crops and sold [145] it later after the crops were taken that he would get more out of it and the crops."

Q. Did you know at that time that he didn't—that Carl Randell did not have title to it?

(Testimony of Earl Burnham.)

A. No, sir, the fact of the matter is, I asked how much Carl owed on his place and he said: "Nothing."

Q. Who did you ask that?

A. Mr. Abegglen.

Q. Did you rely on his statement?

A. Yes, sir.

Q. If you had known that Carl Randell didn't own the property, and didn't have title to it, would you have entered into the contract to sell the Randells the Cove Ranch?

A. No, sir, I would not.

Q. And would you have signed the commission agreement in evidence here?

A. No, sir.

Q. Were you present at the meeting in Twin Falls—strike that, please—I will ask this, first; were you present at the August meeting at the Cove Ranch when the contract was changed?

A. No, I was not.

Q. Were you present at the meeting in Twin Falls in April, 1949?

A. Yes, sir.

Q. What offers did you or your brother make to the Randells [146] in regard to their staying on the property?

A. My brother asked if it was all right with me if we offered to finance them to some extent and keep them on there; I didn't do any of the talking about the financing.

Q. Did you hear your brother make any statement?

A. Yes, sir.

Q. What did he tell them?



(Testimony of Earl Burnham.)

A. In substance, that we would be willing to finance them to some extent to keep them going.

Q. Was anything said about waiving the payment of interest that would soon be due?

A. Yes, sir, but I don't remember the exact wording—we talked a long time trying to work out some way to keep them on there. I don't seem to recall anything definite—any words or definite meaning of what we did say except that we were willing to finance them to a certain extent if they would work out some way to keep on going up there.

Q. And what did the Randells say?

A. They seemed to be in the mood a part of the time—they did state they thought they could make a go of it, and then again in a little while, for instance, Ed said that he didn't think that they ought to try, and Mike would throw in once in a while and say, "Well, I don't see how I can get up there with my mother the way she is." I don't recall a lot of our talk. I know that Carl talked about the same way; that he thought it was best that they didn't try to go on.

Q. Mr. Abegglen testified that you and your brother demanded that they pay \$10,000.00 advance, did you make any such a demand?      A. No, sir.

Q. Did you hear your brother make such a demand?      A. No, sir.

Mr. Worthwine: You may examine.

(Testimony of Earl Burnham.)

Cross-Examination

By Mr. Bird:

Q. You did tell them that if they could raise \$10,000.00 you could revamp the set up?

A. I don't think so.

Q. Do you remember the figure \$10,000.00 being used in this conversation?

A. No, I don't.

Q. Did you hear your brother's testimony earlier today? A. Yes, sir.

Q. And did you hear Mr. Skeen's testimony?

A. Yes, sir.

Q. Didn't he testify in substance to that effect?

A. I don't think he did; I don't think it meant that.

Q. You were present at the Boise Hotel conference in May, 1948? A. Yes, sir. [148]

Q. Did you at that meeting see or hear Mr. Ed Randell present this slip showing the status of his obligation to the Reclamation Department?

A. No.

Q. Were you out of the room during a part of the conference?

A. Yes, sir, I was out with one or two persons and back again around there.

Q. You would not say that he did not present that to the meeting?

A. No, sir, I would not.

Q. Did you hear it stated that Mike owed \$4,000 or \$5,000 on his place?

A. Yes, sir, I got it from someone in the group.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

February 10th, 1950, 10:00 o'clock A.M.

**JACK LEIGHTON**

being called as a witness by the Defendants, after being first duly sworn, testifies as follows:

**Direct Examination**

By Mr. Worthwine:

Q. Where do you live?

A. Moore, Idaho. [149]

Q. Did you ever live on the Cove Ranch?

A. Yes, sir, up until the first of May, 1948.

Q. There has been testimony here concerning a visit to various places, were you present when the Burnhams and others met at the ranch near Eden in 1948?

A. Yes, sir.

Q. With whom did you travel?

A. Mr. Abegglen picked me up at the Cove Ranch and I rode with him in his automobile to Eden, and from Eden to Boise, and on out to New Plymouth and Parma, and back to Boise, and then back to the ranch.

Q. Did you attend a meeting on the evening of the day you had been to Eden at the Boise Hotel?

A. Yes, sir.

Q. Then you went to New Plymouth and back to Boise?

A. Yes, sir.

(Testimony of Jack Leighton.)

Q. You were present when the contract was read?      A. Yes, sir.

Q. Do you recall anything said by Mr. Abegglen when you arrived at the ranch at New Plymouth?

A. He told me that was Carl's ranch. As I recall he told me the number of acres that was in it, but I don't remember the exact acres.

Q. At any time did he tell you that Carl was buying it on a contract?

A. I was not told that, no. [150]

Q. Were you present at the meeting in Twin Falls in April, 1949?      A. I wasn't there.

Q. Did you visit the Cove Ranch—change that—where were you living with respect to the Cove Ranch in the winter of 1948 and 1949?

A. I lived approximately 70 miles from the Cove Ranch.

Q. Did you visit the Cove Ranch in the spring of 1949?

A. I was there about the first of April, 1949.

Q. Was there a machine shed on the Cove Ranch?

A. It was used for various reasons.

Q. How large was it?

A. Well, that shed—it is not clear which you are referring to.

Q. Did any shed have a roof caved in?

A. There was a shed that we used for a loafing shed for the cows, about 150 feet long and 20 or 25 feet wide that had collapsed.

(Testimony of Jack Leighton.)

Q. And do you know the cause?

A. Yes, sir, from the snow piling on the roof.

Q. Were there other buildings damaged?

A. Another building that we had fixed up to milk in.

Q. How large was it?

A. It was large enough for stanchions for 20 head of cows. [151]

Q. What happened to that building?

A. It was completely demolished.

Q. Is it necessary to keep the snow off the roofs in that country?

A. If there are no animals in them, the snow will pile on the roof.

Q. Did you notice one of the tractors that had been left there in the spring of 1949?

A. I inspected all of the machinery in the spring of 1949.

Q. What did you find with respect to the tractor?

A. One had been left with water in the motor, it was badly frozen and broken.

Q. Did you secure an estimate of the cost of repair to that?

A. There was an estimate made of the cost of repairing it, and it would run to approximately \$380.00.

Q. Were there some horses on the ranch?

A. Yes, sir, six head of horses.

Q. Had they wintered out?           A. Yes, sir.

Mr. Worthwine: That is all, you may examine.



(Testimony of Jack Leighton.)

Cross-Examination

By Mr. Bird:

Q. Had these horses wintered out on previous winters?      A. No, sir, they hadn't.

Q. What type of sheds were those that were broken down? [152]

A. One was open on one side with a wall and ends and a tin roof.

Q. And what size were the supporting posts?

A. It was braced about every 14 or 16 feet with supporting posts, I cannot remember their exact size, they were native poles, unsawed, approximately 8 inches in diameter.

Q. How long had it been there?

A. I don't know the exact date it was built, but it was there for several winters.

Q. It wasn't unusual for sheds to cave in in that area during that particular winter?

A. No, it wasn't.

Q. Wasn't the winter of 1948 and '49 an unusually severe one?

A. You mean continually or just by spells?

A. Well, either or both?

A. At times it was a very heavy snow, but clear through the winter there wasn't much accumulated.

Q. You don't know what storm it was or what

(Testimony of Jack Leighton.)

date these sheds collapsed?

A. No, I wasn't present.

Q. Were you present at the conference in May, 1948, when this contract was signed?

A. Yes, sir.

Q. Were you in and about the room and heard the discussion and the remarks by the contracting parties? [153]

A. I was there but it was impossible to hear all of the conversation.

Q. Did you hear any discussion about titles to the Randell brothers property, about their ranches?

A. I heard some of it.

Q. Tell us all that you remember.

A. If I recall correctly there was a balance due on the Ed Randell ranch and there was some balance due on the Mike Randell place.

Q. You heard the discussion on that?

A. Yes, sir.

Q. Did you hear any mention made of Carl's place? A. I heard it mentioned, yes, sir.

Q. Do you remember what that statement was, the substance of it?

A. The substance as I remember it was that Carl had a right to mortgage his ranch.

Q. Was there anything said as to whether or not he had a deed for it—his ranch?

A. I don't recall hearing that.

Mr. Bird: That is all.

(Testimony of Jack Leighton.)

Redirect Examination

By Mr. Worthwine:

Q. You understood that he had title?

A. It was in my mind that he did, yes, sir.

Mr. Worthwine: That is all. [154]

And we rest at this time.

The Court: Do you have any rebuttal?

Mr. Bird: Yes, we will call Carl Randell.

CARL RANDELL

being recalled in rebuttal, having been heretofore duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. You were at the Cove Ranch during the winter of 1948 and 1949 several times?

A. Yes, sir.

Q. Did you make any arrangement to have what stock, crops and machinery was there taken over?

A. I made the arrangement with Mr. Baldwin to clean the snow off the roofs. Each time we had a storm at Twin Falls or Hailey I would call him to go and clean it off, I kept it off the house once or twice a week. This storm that broke the shed down, it snowed about 26 inches during the night and day and he said that he couldn't get there to get it off.

Q. What is your recollection as to the condition of the supporting posts in this shed?

(Testimony of Carl Randell.)

A. The shed was very poorly constructed. The supports inside the ceiling joists and the rafters in the milking barn were eight feet apart at least; ordinarily, the storms [155] would slip off this roof in the milking room, but it snowed all night and it was too heavy for it.

Q. These roofs were not supported as well as it is customary to build them?

A. No, not in that country.

Q. Did you know about the machines that were left there and frozen?

A. That was being used one day by one of the men hired, and he allowed it to sit there; he opened it up and drained it, but he didn't start it up and some of the water was left in there and that is what caused it to freeze.

Q. He was employed by you?           A. Yes, sir.

Q. Had you given him instructions to drain it?

A. Yes, sir, they all had instructions to drain on of the tractors.

Q. You were in the Boise Hotel at a meeting on the 11th and 12th of May, 1948?           A. Yes, sir.

Q. And you signed the contract?

A. Yes, sir.

Q. You took part in the negotiations?

A. Yes, sir.

Q. Was any discussion had relative to your ranch—what your ownership was? [156]

A. In the group there with Mr. Abegglen, we told him that I was purchasing it under a contract—my brother spoke up about that time and said,

(Testimony of Carl Randell.)

“And I think Carl owed more against his ranch than either of the other two.”

Q. Were either of the Burnhams in the group of men there?

A. We were all in that group in those rooms, yes, sir.

Q. In your judgment what was the value of your ranch at that time?

A. We were trying to sell it for \$40,000.00—that was the beet equipment and the crops.

Q. How much did you owe on the ranch at that time?

A. I cannot say exactly, but it was around \$15,000.00.

Q. And what would be that value at this time, would there be any change in the value?

A. Well, it would be about the same, I have an idea.

Q. Were you familiar with your brother Ed's ranch?      A. Yes, sir.

Q. And what would have been the reasonable market value of that ranch at that time?

A. I figured that he should have got at least \$30,000.00.

Q. Were you familiar with your brother Oreal's ranch?      A. Yes, sir.

Q. What in your opinion would have been a reasonable market value of that ranch? [157]

A. As a whole set up, not less than \$35,000.00.

Mr. Bird: I think that is all.



(Testimony of Carl Randell.)

Cross-Examination

By Mr. Worthwine:

Q. When did you surrender possession of your ranch at New Plymouth?

A. I think it was about the 21st of June.

Q. Who took possession?

A. A fellow by the name of Wookey.

Q. Had you been trying to sell that contract on that ranch?

A. Yes, when we was working up this deal I tried to sell.

Q. When did Mr. Abegglen first visit your New Plymouth ranch?

A. I cannot recall the date.

Q. He had been there sometime before the meeting in Boise in May?      A. Yes, sir.

Q. And talked with you about the ranch?

A. Yes, sir.

Q. Did you at that time—the first time that he came down there, tell him that you didn't have title and that you were buying on a contract?

A. I told him what I had in the ranch and that I was purchasing it on a contract when he visited the home.

Q. That was about how long before you met in Boise, that Mr. Abegglen visited the ranch? [158]

A. I don't recall.

Q. Would it be as much as a month before that?

A. No, I don't think it was that long.

(Testimony of Carl Randell.)

Q. And you explained to him fully the condition of your title?

A. Yes, sir, that I was purchasing it on a contract and we were trying to sell for a figure—a good figure.

Q. You owe \$15,000.00?           A. Yes, sir.

Q. How much cash did you get out of it?

A. I cannot say how much.

Q. What did you receive for your equity?

A. I got myself \$5,000.00 after all the thinning expenses and such as that.

Q. The property itself with the growing crops, 40 acres in sugar beets, you received \$5,000.00?

A. Not for my equity then, there was the additional—my expense of caring for the beets at that time.

Q. You surrendered possession about June 21st, 1948?           A. Somewhere in that neighborhood.

Mr. Worthwine: That is all.

### Redirect Examination

By Mr. Bird:

Q. In addition to that you owned a considerable amount of machinery and equipment?

A. Yes, sir. [159]

Q. And would you be able to put an approximate value on that?

Mr. Worthwine: We object to that as being incompetent and immaterial to any of the issues here, there was not included in the mortgage any machinery or equipment.

The Court: I think it is immaterial under the latter agreement; that matter was all taken care of.

Mr. Bird: I think that is all.

Mr. Worthwine: That is all.

### ED RANDELL

being called by the Plaintiff, in rebuttal, having heretofore been first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Bird:

Q. You were present at the meeting in the Boise Hotel in the early part of May, 1948?

A. Yes, sir.

Q. You took part in the discussion leading up to the agreement? A. That's right.

Q. In this discussion was anything said about the status of your ranch?

A. I made the statement, and also gave Mr. Skeen a slip, or a statement from the Denver office, as I had a loan from [160] the government on that, and that was stipulating exactly the amount of the first lien on the place.

Q. What in your judgment would be the fair market value of your ranch at that time—your whole outfit, machinery and stock?

Mr. Worthwine: I don't see the materiality of this, especially the machinery and the stock.

The Court: He may answer.

A. My inventory showed about \$35,000.00.

The Court: You might segregate that as to the value of the land if you care to.

(Testimony of Ed Randell.)

Q. This paper which has been marked Exhibit No. 17, are you familiar with that? A. I am.

Q. What is that?

A. That is our Black Canyon Project—all the lands are appraised with a governmental appraisal so that if it is sold for more than their appraisal, part of the selling price would go back to them—so they appraise our property because they don't want us to sell. If we sell for \$1,000 more than they appraise it for then they get \$500.00 of that, and to avoid any mixup it is appraised every once in a while.

Q. Is this a reappraisal under that government program? [161] A. Yes, sir.

Q. When did you receive that?

A. November 15th, 1949.

Mr. Bird: We offer this in evidence.

Mr. Worthwine: We object to it, it is not signed by anyone, and it is all typewritten; it is immaterial for any purpose here.

Mr. Bird: It is preliminary.

The Court: I suggest to you in view of the objection, which I feel I must sustain, that you have him testify as to the value.

A. That is the fair value.

The Court: What do you figure as a fair value?

A. I cannot say.

Mr. Bird: I will ask another question.

The Court: Very well.

Q. \$25,540.60 on here, now then, what was the amount of the Reclamation lien?

(Testimony of Ed Randell.)

A. It is a little over \$4,000.00—\$4,200.00, or something like that.

Q. As you were concluding that conference in the hotel in May, 1948, was anything said about furnishing a description to Mr. Skeen for the preparation of the mortgage?

A. I don't recall whether they required it from us or from Abegglen, but they asked if I had a deed to the property. [162]

Q. You later sent a description to Mr. Skeen?

A. I sent Mr. Skeen a deed to both pieces of property, one was clear and the other had this lien.

Q. Do you remember who asked for this?

A. Mr. Skeen.

Mr. Bird: That is all, you may examine.

### Cross-Examination

By Mr. Worthwine:

Q. All the land in the Black Canyon Project has a limitation of resale value?

A. All of it has this appraisal, you can sell it, but if you get over that appraisal then you split with them.

Mr. Worthwine: I believe that is all.

The Court: This mortgage for \$4,000.00, that is in force is it?

A. Yes.

Q. It is still of record?           A. Yes, sir.

Q. You understand it will be released upon payment of this five or six thousand?



(Testimony of Ed Randell.)

A. That is the understanding.

Mr. Bird: That is all.

Mr. Worthwine: Nothing further. [163]

OREAL RANDELL

being called by the Plaintiff, in rebuttal, having heretofore been first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Did you testify as to the value of your ranch?

A. I don't know as I did.

Q. What in your judgment was the reasonable value of your ranch in May of 1948?

A. I listed it for \$38,000.00.

Q. Would that be your best judgment of its value? A. Yes, sir.

Q. Has there been any change or much change in land values in the meantime?

A. No, no noticeable amount.

Q. You were present at the conference in May, 1948, at the Boise Hotel? A. Yes, sir.

Q. And you took part in the discussion leading to the contract? A. Part of it, yes.

Q. And was the condition of your ranch discussed in that meeting?

A. Well, I think it was understood that I owed a mortgage on it.

Q. About how much was that mortgage? [164]

A. Approximately \$6,000.00.

Q. And Mr. Bunrham, the two Burnhams, or

(Testimony of Oreal Randell.)

either of them, and Mr. Skeen, were they in the group where it was discussed?

Mr. Worthwine: We object to that, I don't think he has testified that it was discussed.

The Court: I think your question is kind of a double-barreled question.

Mr. Bird: I will withdraw it.

Q. Were Mr. Skeen and the Burnhams in the group where this value was discussed?

A. Yes, sir.

Q. And in this discussion you mentioned that you had a mortgage on your farm or ranch?

A. Yes, sir.

Mr. Bird: That is all.

Mr. Worthwine: No questions.

### HAROLD ABEGGLEN

being called by the Plaintiff, in rebuttal, having heretofore been first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Bird:

Q. You heard some discussion as to when you first met the Burnham brothers, do you have any recollection where you met Perry Burnham? [165]

A. Yes, sir, it is clear, Perry and Earl Burnham came to my office in Hailey.

Q. Is that where these negotiations were instituted? A. That was the first meeting.

Q. Did Mr. Skeen come to your office at that time?

(Testimony of Harold Abegglen.)

A. I don't recall seeing Attorney Skeen until the Twin Falls meeting.

Q. Where was this listing signed between you and the Burnhams?

A. That was in Twin Falls, after we came to an agreement on the commission to be paid me, and the date of the signature was April the 29th.

Q. When and where was the addendum on the back of it signed?

A. At the Boise Hotel on the consummation of the contract of sale.

Q. There was a discussion as to the statement you made to the Burnhams concerning the value of this property; now do you have a clear recollection as to what you advised them?

A. I advised them that in the three Randells ranches they had a \$70,000 equity; I didn't stipulate that they were clear.

Q. Was there anything said as to liens on the property?

A. Yes, sir, I think it was clear at that meeting.

Q. Did the statement of the value take into consideration the fact that there were mortgages on the property? [166]

A. Yes, sir.

Q. And what was said about those mortgages to be signed on the three ranches?

A. Attorney Skeen made the request of the Randells to send the descriptions to him at Salt Lake City—he couldn't wait in Boise. He made no request of me or I would have remained in Boise and secured the information.

(Testimony of Harold Abegglen.)

Q. Did you discuss that with Mr. Skeen?

A. Yes, sir.

Q. What was that discussion?

A. I suggested that he remain and secure that information, and he said that he couldn't remain here, that he had to go back to Salt Lake City, and that he would carry on the transaction through the mail.

Q. In reference to the demand, that has been mentioned, that the Burnhams made of the Randells for \$10,000.00, what were the facts in regard to that?

A. That was in the meeting at the Park Hotel, it wasn't a demand, it was a request by the Burnhams from the Randells that if they could raise \$10,000.00 by some means they would consider re-vamping the agreement to their satisfaction. I was at the meeting a good deal.

Q. Did you take part in the discussion at the meeting at Twin Falls on that occasion? [167]

A. I did until Saturday and then adjourned.

Q. They had not come to any agreement when you left?

A. They had not come to any agreement, no.

Q. In showing people these ranches, did you or had you referred to them as Carl's ranch?

A. When Jack Leighton and I met there at New Plymouth we took them to Carl's place and we said this is the ranch that we said was Carl's; they viewed the ranch and then we took them to Parma and showed them Ed's ranch; they talked to the

(Testimony of Harold Abegglen.)

owners—not always in my presence, and they asked them questions.

Q. Are you familiar with this check that is introduced for \$500.00 given for the weir?

A. Yes, sir, that was give by Jack Leighton to me to pay for the cost of the weir at the court house in Hailey, to the man who handles those accounts.

Q. What did you say about the debt on Carl's ranch?

A. I didn't know the amount he owed on the ranch; all I knew was that he was buying on a contract and had been there a couple of years; that his equity was equal to the amount mentioned in the contract.

Q. Was any statement made to the effect that he owed nothing on this ranch? [168]

A. Never, no, sir.

Mr. Bird: That is all.

Mr. Worthwine: No questions.

Mr. Bird: We rest.

Mr. Worthwine: The Defendants rest.

Mr. Bird: At this time we desire to move the amendment to the complaint to conform with the proof. In the first line of paragraph two of the complaint where it states, "On April 29th, 1949," that is an error, and it should be "April 29th, 1948."

Mr. Worthwine: No objections.

Mr. Bird: And then down about five lines in the same paragraph, on the 5th line it says: "Hailey



(Testimony of Harold Abegglen.)

and Blaine County, Idaho.” That should be a comma between Hailey and Blaine County.

Mr. Worthwine: We have no objection.

The Court: Those amendments may be made.

Mr. Bird: And on the second page, “1949” appears twice, “April 29, 1949,” and “May 15, 1949,” each of these should be “1948.”

Mr. Worthwine: We have no objection to changing 1948 to—or rather in the place of 1949.

The Court: The amendments may be made. [169] I understand it is agreed that a transcript is to be made of the proceedings and the parties may each have thirty days after the delivery of the transcript in which to prepare their briefs and present them. Of course, you may prepare them as early as you can or want to after the delivery of the transcript, and you may each pay one-half of the cost, and the Court will either assess the cost or let each side pay for himself. The matter will be taken under advisement at this time, awaiting the filing of your briefs. You, Mr. Bird, may have thirty days in which to file your brief, and Mr. Worthwine—the Defendants may have thirty days after service of Plaintiff’s brief in which to reply, and if necessary the Plaintiff may have an additional ten days.

#### Certificate

State of Idaho,

County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States Dis-

trict Court, for the District of Idaho, Southern Division, and

I further certify that I took the evidence and proceedings had in and about the trial of the above-entitled cause in shorthand and thereafter transcribed the same into typewritten form; and

I further certify that the foregoing transcript consisting of pages numbered consecutively to page 170 is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof, I have hereunto set my hand this 22nd day of March, 1950.

/s/ G. C. VAUGHAN.

[Endorsed]: Filed March 23, 1950.

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[Endorsed]: No. 12648. United States Court of Appeals for the Ninth Circuit. Perry E. Burnham and L. Earl Burnham, Appellants, vs. J. Harold Abegglen, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed August 10, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, Ninth Circuit

No. 12648

PERRY E. BURNHAM and L. EARL  
BURNHAM,

Appellants,

vs.

J. HAROLD ABEGGLEN,

Appellee.

## STATEMENT OF POINTS ON APPEAL

Come now the appellants and make the following Statement of Points on Appeal:

1. That Finding No. 7 is contrary to the evidence in that it appears, without conflict, that the Randell brothers had abandoned the ranch and were unable to proceed further under the contract of sale.

2. That Finding No. 9, that plaintiff was free from misconduct, concealment or misrepresentation, is contrary to the evidence.

3. That Finding No. 10 is contrary to the evidence in that it affirmatively appears from the evidence that the Randall brothers could not complete the contract of sale because Carl Randall had no land upon which he could give a mortgage, which fact was known to plaintiff and concealed by him from the defendants when the contract of agency was made.

4. Conclusion of Law No. 2 is not justified by the evidence and is not sound in law for the reason

that because of the failure of Carl Randall to give a note and mortgage, the contract of sale was not complete. That plaintiff knew Carl Randall could not give a mortgage because he had no deed to his property which fact he concealed from the defendants, and defendants were compelled to protect the property to make a new and different arrangement with the Randalls.

5. That by plaintiff's own admissions, he knew that Carl Randall did not have a deed to his property and could not comply with the contract at the time the original contract of sale was made, and the agency agreement was signed by the defendants.

6. Conclusion of Law No. 4 is contrary to law in that defendants were compelled to make a new agreement to protect their property and avoid litigation because the original agreement could not be consummated and they were justified in disregarding the agency agreement because plaintiff had concealed from them the fact that Carl Randall did not have title to his property and could not perform under the original contract of sale.

7. Conclusion of Law No. 5 is not justified by the evidence and is contrary to the law in that defendants were compelled to enter into the agreement of August 12th and the new agreement was not in any sense a waiver of their rights to defend as against plaintiff's agency agreement because they had been put in a position where they were compelled to act by the concealment on the part of the agent.

8. Conclusion of Law No. 6 is not supported by the evidence in that the Randalls were in default, had abandoned the ranch, and defendants were required to enter into negotiations with them to protect their interests and to avoid litigation.

9. Conclusion of Law No. 7 is not supported by the evidence and the law.

10. The contract of sale by the defendants to the Randalls was not completely executed because Carl Randall could not give a mortgage on deeded land as provided in the contract.

11. The broker's agreement was dependent upon and was to take effect only upon the execution and delivery of the original contract of sale which was not consummated as drawn.

12. The original contract of sale was not so far ratified or given effect as to put in force the agency agreement, but because Carl Randall could not give a note and mortgage upon deeded land to secure performance, another and different contract was necessarily made after the Randalls went into possession.

13. The relation of principal and agent existed between plaintiff and defendants and required of plaintiff the utmost good faith which he betrayed by withholding from defendants knowledge of the fact that Carl Randell did not have title to the farm. farm.

14. Participation by plaintiff in putting Randalls in possession of the property when he knew



Carl Randall could not give a mortgage upon the farm, exhibited to the defendants as his property, and did not own the same, should estop plaintiff from recovering a commission.

Dated this 24th day of August, 1950.

/s/ J. D. SKEEN,

/s/ PERRY H. BURNHAM,

Attorneys for Appellants.

State of Utah,

County of Salt Lake—ss.

Emily Urry, being first duly sworn, deposes and says: That she is a stenographer employed in the office of J. D. Skeen, one of the attorneys for the appellants above named; that on August 24, 1950, she enclosed a copy of the foregoing Statement of Points on Appeal in an envelope addressed to.

Bissell and Bird, Attorneys at Law, First Security Bank Building, Gooding, Idaho, affixed correct postage thereto and deposited the same in the United States Post Office at Salt Lake City, Utah, for delivery to the said addressees.

/s/ EMILY URRY.

Subscribed and Sworn to before me this 24th day of August, 1950.

[Seal] /s/ THOS. W. MUIR,

Notary Public.

My commission expires Nov. 22, 1950.

[Endorsed]: Filed August 26, 1950.

[Title of Court of Appeals and Cause.]

### STIPULATION RE EXHIBITS

It is hereby stipulated and agreed between counsel for the respective parties that the following-described exhibits in the above-entitled cause may be considered in their original form by the appellate court, without the necessity of the same being printed as a part of the official printed record:

1. Plaintiffs' exhibit 1 (broker's license);
2. Plaintiff's exhibit 2 (broker's commission agreement);
3. Plaintiff's exhibit 5 (water assessment receipt);
4. Plaintiff's exhibit 8 (quitclaim deed);
5. Plaintiff's exhibit 10 (letter of J. D. Skeen dated July 30, 1948);
6. Plaintiff's exhibit 12 (letter re marketing cattle); and
7. Plaintiff's exhibit 13 (Kraft Co. letter).

Appellee hereby waives and withdraws the designation of additional portions of record requested to be printed by filing bearing date September 6, 1950.

/s/ J. D. SKEEN,

/s/ PERRY H. BURNHAM,

Attorneys for Appellants.

/s/ E. B. TAYLOR,

/s/ W. G. BISSELL,

/s/ BRANDON BIRD,

Attorneys for Appellee.

So Ordered:

/s/ CLIFTON MATTHEWS,

/s/ HOMER BONE,

/s/ WALTER L. POPE,

United States Circuit Judges.

[Endorsed]: Filed September 20, 1950.

